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Tagore Law Lectures, 1921

THE MODERN THEORIES OF JURISPRUDENCE

BY

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FOREWORD.

SOME explanation is needed for the departures from my original plan as had been proposed in the synopsis. The accompanying comparative statement will indicate their nature and extent. The first lecture as it now stands, is an addition introduced to prepare the student for the modern theories. The modern theories of jurisprudence were the logical and historical issues of the older theories and a short running account of the progress of jural thought in Europe from the days of the Ionic philosophers down to the 'Renaissance' and 'the Reformation' is to my mind, an essential preliminary to a course of lectures on modern juristic theories. Lecture II (as it now stands) corresponds to the first lecture of the synopsis; the only difference is that I have carried it to include the juristic contributions of Kant and Fichte which constitute the culmination of the rationalistic doctrine of 'Law of Nature' and mark the turning point of its career in the modern era. These contributions (of Kant and Fichte) were made in the early part of the 19th century, and so I have transposed into this lecture part of what I intended at first, (*i.e.*, in the synopsis) to include in the next. It is to my mind an improvement in the direction of logical unity. Lecture III corresponds to Lectures II & IV of the synopsis taken together. Opinions may be divided as regards the propriety of discussing in the same lecture the metaphysical theories like those of Schelling and Hegel and the decidedly empirical (at least in comparison to the former) theories, for instance, of Hugo and Savigny. In fact, I myself had originally thought (as can be seen from my proposed arrangement in the synopsis) of dealing with the German Historical School under the head of "the Empirical theories" after the Analytical School. But my present idea, after maturer consideration, is that there is greater affinity between the Hegelian Schools and the 'Historical' than between the latter and the Analytical. The former two were not only contemporaneous in history but were born and nurtured in the same social atmosphere; and they were both inspired by the same great "Historical conception or idea"—the idea of the 'historic' origin, growth and evolution of civil society and law. The Historical school had itself its metaphysical concepts, (*e.g.*, of popular or national "genius" or 'spirit') which can be fully appreciated only by reference to the current Hegelian ideas. The fourth lecture corresponds to the third of the synopsis. It deals *inter alia* with the Austinian theory of law, the criticisms that have been urged against it, and the arguments advanced by the Austinians to defend their position against these criticisms. The major portion of this lecture I had originally written for my address (which was however, left undelivered) as the chairman of the Board of Lecturers in Jurisprudence at the University College of Law to the law students of Bengal and my stout adherence to and support therein of the Austinian theory is explained by the view (which I have come to entertain as a result of my fairly long experience as a law-lecturer) that the students should first of all be taught thorougly to understand and appreciate the good and strong points of the system elaborated in their text-book (1) before they are encouraged to criticise it. In fact, I have adopted that plan throughout these lectures, laying out in the clearest possible light, the strong points of every juristic theory as it came up for discussion, and reserving all criticisms till all the theories have been presented with their unities and differences sharply and distinctly brought out and developed.

Lectures V, VI and IX (of the synopsis)—at least the bulk of the topics referred to therein—have been amalgamated into one as the fifth lecture which is now headed as "General Observations—The Organic Conception." This course has been adopted for a variety of reasons. The contents of Lectures V and IX of the synopsis are so closely related to each other that I did not desire to keep them apart as was originally proposed. Then again, the Organic conception of society and the Organic theory of law represent the first stage of the great movement in the world of thought which I have described as the 'Sociological Tendency.' The movement overtook and carried all schools and theories (philosophical as well as scientific) along with it, and the Organic idea or conception was, in the initial stages of the movement, accepted as the common tenet or postulate of almost every juristic and societary speculation. So instead of dividing the discussion and treatment of the Organic theory of law as respectively handled by the philosophic and the scientific schools into separate lectures, I have put them side by side within one ; thereby presenting a fairly compact picture of the whole social and juristic atmosphere of that period of transition. Part II dealing with the 'Sociological Tendency' is thus disposed of in one lecture alone.

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(1) Holland's Jurisprudence. (Holland is an Austinian.)

I have taken a somewhat bold step in transferring the 'Social Philosophical' schools from Part II (as proposed in the synopsis) to Part III which deals with the sociological theories, for it involves a departure from the current nomenclature. "Sociological Jurisprudence" and "Sociological Theories" are gradually becoming terms of art; but I think there is yet time to make an effort to prevent their acquiring (which to my mind, will be injurious to the science of law) a too restricted meaning. Jurists belonging to the recent 'social-philosophical' schools (Stammler or Kohler for examples)—are no less sociological than many of the positivistic camps. Instead of describing the former as "Social-philosophical" jurists, (*i.e.*, as philosophical jurists with a sociological tendency) I have decided to describe them as sociological jurists, and their theories as particular species, (*i.e.*, philosophical) of the 'Sociological'; which is thus given a generic meaning and character. For the same reason, the recent off-shoots of the Analytical or Imperative theory (cf. the 'Theory of Norms,' also the Neo-Austinian theory) and of the Historical theory (cf. the 'Comparative' school and theory) which are all permeated by the sociological conception or idea are now discussed under Part III instead of Part II. So my present Lectures VI, VII and VIII (corresponding respectively to Lecture X, VII and VIII of the synopsis—the two latter being transferred from Part II to Part III) have all been put under Part III. My ninth lecture, like the first, is an innovation—an addition necessitated by the new materials and thought accumulated in course of the preparation of these lectures after my synopsis had been submitted.

The last two Lectures (XI and XII) of the synopsis have now been elaborated into four (X to XIII). All the juristic doctrines discussed seriatim in the previous lectures had now to be critically examined together; first, with reference to their bearing on some of the fundamental and universal topics relating to the theory of law, and next, with reference to the help or guidance they offer in the practical fields of legislation and administration of justice. A recent movement (more recent in fact, than the sociological tendency itself) has been set on foot in the direction of the unification of theories and methods, (I have discussed it in detail in Lectures VIII & IX) and as I took care to point out in my introductory lecture, this unification is not only desirable in the interests of the juristic science, but is inevitable as soon as the schools come to have a wider and more comprehensive view and outlook of the scope, objects and methods of jurisprudence. I conceived it to be my duty to contribute my humble quota in furtherance of this movement in these lectures on behalf of my University. "The Synthetic Method and Theory of Jurisprudence and the Synthetic Philosophy of Law" (Lecture X) gives a general outline of what I take to be the right line of thought along which a complete unification of juristic theories and methods may be brought about. It is further developed in the next two Lectures (XI

& XII) with reference to some topics of theoritical jurisprudence, and in Lecture XIII in connexion with the practical problems of legislation and adjudication. Throughout in these Lectures (X to XIII) I have adhered to the method of 'constructive criticism'—the sifting of the truths (and elimination of the errors of one-sidedness) of the existing theories and utilising them for the constructive work of synthesis or unification of the maturest results hitherto achieved by up-to-date science as well as philosophy of law.

In this connexion, I have got only one more observation to make. It was pointed out to me as a defect by a very high authority that my synopsis did not contain any reference to Hindu jurisprudence. My first impulse naturally was to find some excuse in the fact that Hindu Jurisprudence is not 'modern.' But I at once realised the force of the remark in view of the fact that Hindu juristic theories had in fact passed through almost all the phases which characterised the various stages of the juristic history of Europe and Anglo-America since the dawn of civilisation; and moreover had reached in its most developed form a synthesis which has not yet been attained in the modern world. I accordingly promised to add a lecture to remedy the defect. Need I say that the synthesis I have proposed in my last four lectures has really been nothing but the adaptation of the synthetic philosophy and jurisprudence of the Hindus to modern conditions? This is the only way in which I found it possible, within the limited time and space at my disposal, to redeem my promise and this accordingly constitutes the most important addition to the programme laid out in the synopsis. The comparative study of Hindu legal philosophy and jurisprudence in all its phases in the light of the modern juristic theories is a fascinating subject for juristic research, and is further, bound to be immensely useful in the practical field of legal-reform which is now-a-days so much in demand all over the civilised world. But it is a vast subject, more comprehensive and arduous than even the whole course of my lectures, and I trust it may be selected as a future subject of the Tagore lectures and undertaken by some worthier devotee (than myself) alike of Hindu and the modern social and legal philosophies; or better still, considering that the subject is capable of infinite expansion and research, a more permanent chair or institution may be founded under suitable conditions to promote its culture.

Comparative statement of the arrangement and subjects (as proposed) in the synopsis and (as executed) in the manuscript.

SYNOPSIS.

PART I.—*The Individulistic Theories*—
Lecture I.—The Philosophical Theories of the 17th and 18th centuries.
„ II.—The Philosophical Theories of the 19th century.
„ III.—The Empirical Theories (I)—The Analytical or Expositary Theory and School.
„ IV.—The Empirical Theories (II) The Historical Theory and School.

PART II.—*The Sociological Tendency*—
Lecture V.—Historical and General Retrospect.
„ VI.—Evolution of the Philosophical Theories under the Sociological Tendency (I) The (idealistic) Organic Theory and School.
„ VII.—do. (II) the Social Philosophical Theories and Schools.
„ VIII.—Evolution of the Empirical, *i.e.*, Analytical and Historical Theories under the Sociological Tendency— Intermingling of Methods and Variegation of Theories, Schools and Interpretations.

PART III.—*The Sociological Theories*—
Lecture IX.—Sociological Jurisprudence. General Principles.
„ X.—The different Theories of Sociological Jurisprudence as representing gradually developing stages of Sociological thought.

PART IV.—
Lecture XI.—Some fundamental topics of Jurisprudence considered from the points of view of various theories & schools.

MANUSCRIPT.

Lecture I.—Preliminary Observations and Retrospect of the Theories of Jurisprudence in Europe down to the dawn of the modern era.

PART I.—*The Individualistic Theories*—
Lecture II.—The Philosophical Theories (of the 17th, 18th, and early 19th centuries) of Modern Jurisprudence.
„ III.—The Modern Theories of Jurisprudence in the 1st half of the 19th Century (1)—Philosophical Theories the Historical Conception.
„ IV.—The Empirical Theories of the 1st half of the 19th century—the Analytical Theory.

PART II.—*The Sociological Tendency*—
Lecture V.—General Observations—the Organic Conception.

PART III.—*The Sociological Theories*—
Lecture VI.—The Sociological Theories of Jurisprudence (the Scientific Theories).
„ VII.—Evolution of the Philosophical Theories under the influence of the Sociological Tendency—the Social Philosophical Theories and Schools.
„ VIII.—The Sociological Tendency in its present juridical ferment. Intermingling of Methods and Variegation of Theories, Schools and Interpretations.
„ IX.—Recrudescence of Idealism in recent Juristic Theories "the Return to Kant" (rather Fichte).

PART IV.—*The Synthesis of Methods and Theories in general and with regard to some fundamental topics*—
Lecture X.—The Synthetic Method and Theory of Jurisprudence and the Synthetic Philosophy of Law.

SYNOPSIS.	MANUSCRIPT.
PART V.—*Theories on the making and the application of Law.*— *Lecture* XII.—Legislation and Administration of Justice. Legal Hermeneutics.	*Lecture* XI.—The Modern Theories of Jurisprudence and their relation to the Synthetic Philosophy, and Theory of Law. " XII—Juristic Theories regarding the Sources and Division of Laws and Rights examined from the point of view of Synthetic Legal Philosophy and Jurisprudence. PART V.—*The Bearing of the Modern Theories of Jurisprudence (including the Synthetic Theory) on the practical Making, Interpretation and Application of Law.* *Lecture* XIII.—Legislation and Administration of Justice. Legal Hermeneutics.

INTRODUCTORY LECTURE.

Utility of the subject

In selecting the subject for this year's Tagore Law Lectures, the Faculty of Law of the University of Calcutta have further developed the new tendency, first noticed a year ago, of encouraging the study of the science and philosophy of Law along with that of Law itself. In this, our University has happily followed the lead of the United States in America, where a band of the most eminent lawyers and jurists have formed themselves into an association for the furtherance of scientific learning, and the standard works of the Continental masters of juristic thought of all schools are being translated into English in order to make them accessible to the American students. The earlier method of imparting practical training in Law, adopted in the law schools at Harvard and elsewhere, has not indeed been abandoned—and its unprecedented success in the direction of the object for which it was adopted is well known—but it has been supplemented by an increased regard for the fundamental principles of the general science, and a proper appreciation of the fact that simple one-sided attention to Law and its practice without a solid ground-work in Jurisprudence can produce only lawyers and no jurists, and that a mere successful practitioner in the law courts is not always an adept in guiding the society when the latter is called upon to adjust itself to new situations like those which the social upheaval of modern times has created. The practical instincts of the English and American peoples and lawyers had ever failed to see eye to eye with the more idealised forms of thought and reasoning of the Continental jurists, and this has been the chief reason why in England and America, and naturally also in the Anglo-Indian Universities, Jurisprudence has hitherto been studied in a limited form, as taught by the Analytical School, and the views of the other schools, and especially of the Philosophical School, have been only looked into, in the advanced courses, more as a matter of curiosity, and with a smile of pity, than in a spirit of research. The legal scholars of America of the present day have now changed that attitude into one of respect, and the result has been a rapprochement of the different schools in America, as in France and Germany, and the rise of the new unified school of Sociological Jurisprudence, for the better and more effective solution of the serious social and legal problems which can no longer be disposed of or temporised by the superficial and pragmatic treatment hitherto dealt out by practical lawyers, legislators, and judges. India also can not help sharing in these problems of the civilised world and it is but meet and proper that the study of the fundamental principles of Jurisprudence, from the points of view of all the schools, should receive the same impetus and encouragement from the premier University of India as it is receiving in the continent of Europe and in the United States.

Social and legal phenomena make their appearance and develop themselves spontaneously in societies long before they are studied by man with a view to build up a science. The social forces at first work out their natural results without any intelligent human guidance. It is only in a comparatively civilised stage of social life that the thoughtful section of the people begin to study these phenomena, note their coincidences and eccentricities, and find out their causes and modes of development and formulate them as a science. The knowledge thus acquired is next utilised by turning it to the useful purpose of modifying the operation of these natural forces so as to suit social necessities and conveniences and to promote social advancement. The study of phenomena and their laws confers knowledge, and along with it power, and the votary of science who begins as a servant or student ends as a master to control and rule. In the domain of the physical sciences man's mastery over nature acquired through systematised knowledge has been amply demonstrated, but the truth obtains everywhere, in the domain of the social and legal sciences as well as in the physical. Science everywhere leads to art: from the knowledge of what *is* we inevitably come to the knowledge of what *should be* and also how the desirable is to be accomplished.

The birth of Modern Jurisprudence

Turning from the appropriateness and utility of the subject of these lectures, let us now specify its scope and boundaries. Modern Jurisprudence may be said to have taken its birth in the 17th century. It is true that many of the ideas prevalent in the time of Grotius and Hobbes have now been fully outgrown; but, for the full appreciation of the juristic theories and principles of the present age, it is necessary to go back to the period of the publicists, who in the wake of the Reformation and the liberation of individual conscience, released human reason from the bondage of medievalism and set up the 'natural' rights of individual against the 'divine' right of the State. The older Jurisprudence of Greece and Rome, along with the other products of the classical civilisation of the ancients, had been smothered and killed during the Dark Ages, and substituted by a mystic and religious system of philosophy, morals, and law having as its sole source and authority the Catholic Church which proposed to monopolise all the all legal and social order and rules, as well as the ideal, which is never fully realised in life, and which ever stands till the end, as the ultimate goal and test for their further improvement and development in the right direction. As a corollary to this standpoint, the Philosophical School is critical in its attitude, and often suggests lines of improvement of the law ; for which it is sometimes called the Ethical School, and its juristic productions are often decried as belonging not properly to Jurisprudence but to the Art of Legislation. It is however a mistake to mix up the fundamental position with one of its consequences, and miss the real character of the philosophical standpoint as a standard of division. It studies Law primarily as it is, with reference to its foundation and ideals, and only secondarily as it should be ; its real character is marked by its inner standpoint resting in the absolute and its direction from the ideal within to its expression or realisation outside. The empirical or natural standpoint on the otherhand adopts that of the physical or natural sciences, resting on the outer phenomena, *i.e.*, on the manifested legal and social facts as collated by direct observation and history, and proceeds by the methods of inductive science to gather the laws underlying and governing them. The direction of movement is here, as opposed to that of the Philosophical School, from the external variety to the inner or underlying unity. The Individualistic tendency looks upon the individual as the centre in whose interest the Society, the State and all legal and social rules exist and work, and values social institutions and legal systems only as they affect the individual with regard to his liberty or utility. The Sociological tendency transfers the centre of study from the individual to the Society, and puts the Society as a whole, where the individualist would place the individual. The Analytical method is limited to the analysis of present conditions, *i.e.*, of the mature and civilised legal institutions and systems, and its conclusions accurately represent the characteristics of such systems. It includes comparative study of the matured and civilised contemporary systems of Law, but does not care to observe the earlier and less advanced systems, or to watch the progress of legal ideas from their infancy to the present state of maturity. Herein lies its contrast with the Historical method. The Ethnological and Anthropological methods of study, now regarded as branches of the Comparative method, are naturally not cherished by the purely Analytical jurist, but they have now become valuable weapons for the researches of the Historical School.

The Individualistic and Sociological tendencies.

The Analytical and Historical methods

The Comparative method combines the Analytical and Historical and includes the Ethnological and Anthropological.

Closer scrutiny of Gareis' classification

You are now in a position to make a closer scrutiny of the classification of the theories and Schools as given in Garies' book. The Imperative idea of Law is ordinarily entertained by the Analytical School, whose empirical enquiry is limited only to the matured legal systems of civilised countries where the fully organised State absorbs all forces and functions of the Society for securing its peace, security, and advancement, and where legislation is the primary form of law-making. The Analytical jurist is naturally struck by the irresistible power of the government, the constant association of law and legislation, and the enforcement of the law by sanctions meted out through the judicial and administrative machinery and forces of the State. Those who do not care to carry their investigations behind the State, and to see underneath the command and will of the Sovereign or the legislator the working of independent social forces, are content with the purely imperative idea of law and ascribe to the State a creative and arbitrary authority as the ultimate source of law. The Sociological jurists of the Positive type have likewise their imperative idea of Law, derived from their analytical researches and studies, and a proper appreciation of its elements of force, sanction, and command, emanating from the State or the Sovereign, but they do not regard the State or the Sovereign as the arbitrary and ultimate source of Law, or its final authority, but as the

The Imperative idea of the Analytical school.

Its comparison with that of the Sociological schools and of the Formal (Philosophical) school.

mouthpiece for the working of the social forces which express themselves as laws irresistibly through the official organs of the Society. A similar idea of Law is reached in another form by the modern Psychological branch of the Sociological Schools (*cf.* Wundt, Jellinek) and in yet another by the Formal branch of the Philosophical Schools, which separates Law of Nature and Positive Law as two independent systems and while placing the former on the *à priori* basis of reason, admits the efficacy of conscious will of the State in the domain of the latter. I do not propose to try your patience at this stage with any detailed examination of the Imperative idea of Law or of the shades of difference in the views of the different schools which I have just noticed as some way or other subscribing to that idea; but what I do wish to emphasise here is firstly, that the Imperative idea is not the characteristic of any single school which differentiates it from all the others, but is more or less shared by various schools, some philosophical, some empirical, some individualistic and some sociological; and secondly, that the idea is really an ordinary outcome of the analytical method of enquiry, and was commonly reached by various schools whenever they confined their attention to the settled *form* of the law rather than to its *spirit*; to its immediate source in the state organs rather than to the ultimate

It is not co fined to any single scho

spring in society from which it arises;—or to the element of conscious and voluntary imposition, attracted by this prominent characteristic of Law in the civilised states. The Historical method of enquiry has, on the other hand, attached greater importance to the earlier conditions of society and law when law was less arbitrary or organised, and consequently the Historical School and the other schools which had taken their cue from the Historical, have always found it difficult to accept the Imperative idea. We thus see that the Imperative idea of Law is resolvable into the Analytical method (which confines investigation to the matured legal systems) as its most important component, and the Individualistic tendency, which discourages attempts to see behind the will of the Sovereign the operation of social forces which cannot be attributed to any determinate human will except through the psychological idea of a "group will." It is therefore certainly better that, instead of being regarded as forming an independent theory under a separate distinctive category, as if the Imperative view were a fundamental conception of law not resolvable into simpler elements, it should be located, by a more logical scheme of classification, as a product of the interaction of the Analytical method and the Individualistic tendency. Austin, Kant, and Jhering alike adapted themselves more or less to the Impera-

Analysis of its elements.

tive view of Positive Law, but they certainly did not belong to the same school; for the first was an empirical jurist of the Analytical and Individualistic type, the second was a Philosophical—Individualistic jurist, and the third was a Sociological jurist of the Analytical and Positivist (or rather, Psychological) type.

Jurists should be classified by their standards rather than by their conclusions.

It is therefore a mistake to identify a school with some of the conclusions of a few of its most celebrated exponents on certain topics of jurisprudence. A jurist is to be marked by the characteristics of the standpoint, method, and tendency with which he starts his studies and investigations, rather than by his results and conclusions; for the same conclusions may be reached by diverse ways, and two jurists widely different in their essential attitudes may be mistakenly taken to belong to the same group or school through a superficial similarity of their views. Hobbes and Kant alike subscribed to the doctrine of Law of Nature; Savigny and Hegel equally recognised that Law is found and not made, and yet no one with the slightest insight in Jurisprudence would hesitate to put them asunder as belonging to wholly opposite schools. Hobbes and Savigny were both empirical jurists, the first, of the Analytical, and the second of the Historical type or school; but Kant and Hegel were Philosophical jurists belonging respectively to the Formal and Metaphysical schools. The rise of the modern Sociological Jurisprudence, in which all the shades of thought of the older schools have merged and received a fuller amplitude, requires us to be specially cautious in finding the proper place, inside the schools, of a jurist who combines opinions, tendencies, and modes of thought, which were formerly regarded as widely divergent if not altogether inconsistent with each other, and hence, by common usage, taken as representing rival theories or schools of Jurisprudence. Technical meanings and connotations have now gathered round terms, primarily indicative of characteristic standpoints, tendencies, or methods, which may mislead and confuse the young student in his study of the theories or schools and their classification. The Historical school, for instance, *primâ facie* means or should mean the school which proceeds, by way of historical research, to trace the origin and development of Society, State, and Law; but by common usage, it has been identified, as Garies' classification would indicate, with the class of jurists who hold that Law is found and not made: that, with an unconscious origin, it has a regular spontaneous and peaceful development, over which all arbitrary attempts of the human will at intelligent direction or modification against the national spirit, must be ineffectual. No doubt this has been due to the fact that the above had been the conclusion of the great

Confusion due to class-names.

Examples.

jurists like Hugo, Savigny and Puchta, who formed the National Historical School in the controversy over Legislation in Germany in the early 19th century, and who inaugurated the method of scientific historical research as the basis on which all superstructure of Jurisprudence should be built up. The difficulty arises when we have to compare the positions of the English and the German Historical Schools. The former with their Analytical tendency will hardly go as far as the latter towards the doctrine of the absolute impotence of Legislation in the development of law; but can we, for that reason, deny their claim to be classed inside the Historical group? I have already named Hegel as an exponent of the idea that Law is not a product of the human will; but he derives it not as a truth found from experience or the data of history, but philosophically, as an innate and absolute idea, of which the historical institutions are but dialectic developments realised in nature. Can we call Hegel a Historical jurist because of this superficial similarity of his conception of Law with that of the German Historical school?

Other class names of theories and schools, —*e.g.*, the Analytical, and the—Formal, which have also acquired technical meanings, similarly mislead and confuse the novice and obstruct scientific classification. The danger is still greater with regard to the theories and schools of more recent origin, where the class-name is applied loosely, sometimes in its original grammatical sense, and sometimes as a technical term of art. Take as example, the Organic or the Positive Theory or School. The first class name would at once recall to the mind of the student of Jurisprudence the names of Krause, Ahrens and Roder—the philosophical jurists, who taking their inspiration from the organic idea of Schelling, regarded the universe as an immense organism, and the social institutions of man, including Law, as the organic, and therefore harmonious developments of an absolute idea, along lines as fixed, regular, and independent of human will, as those of a tree growing from the seed. This is so because we give to the "Organic Theory or School" a technical meaning. But where should we place Puchta or Spencer? They had as well their organic theories of Society and Law and of their development; but they were Naturalists or Realists, and did not belong to the Metaphysical camp, and it would wholly be a mistake to class them together with the other three as belonging to the "Organic School;" for that would be ignoring their difference which is more fundamental than their similarity. The Positivist Theory or School of Jurisprudence is often identified with the Sociological (*Vide* Charmont), and is sometimes associated with the Imperative theory because of the common idea of the essentiality of force or constraint of the State behind Law. The "Sociological theory or School" is, however, a generic term, capable as pointed out before, of including many species and shades of thought which may be fundamentally different, though subscribing in common to the sociological tendency and the theory of force; but the 'Positivist School' is or ought to be, a technical term meant for a special class of Sociological Jurists representing, after Comte its founder, the earliest and absolutely empirical and mechanical phase of Sociological Jurisprudence. The ingredient of "causal will" usually associated with the Imperative idea of the Analytical and Psychological jurists is wanting in it. The force behind Law is regarded by the positivist as blind, mechanical, or natural, rather than as psychic.

Fixing of standards alone is not sufficient.

I have now sufficiently dilated upon the necessity of basing our classification of the Theories or Schools of Jurisprudence upon fundamental principles independantly of class-names with or without technical meanings. It is not, however, sufficient simply to select and to fix them as standards of division, for the principles themselves, as adopted by the successive jurists, run through a course of evolution under mutual action and reaction and also by the influence of constantly shifting social, political, economical, and other conditions. The standards

We must also study their evolution and its causes.

themselves take new shapes, not abruptly, but by imperceptible changes, like animal life in natural history. The study of the Theories of Jurisprudence should therefore not only direct itself to their original forms, but should intelligently follow their course of development and modification, and trace its direction and causes. The Philosophic standpoint, for instance, had first taken shape as the Dogmatic Theological Jurisprudence of the Middle Ages. It changed into the Rationalistic type when the dominance of Theology and the Church was overthrown by the Protestant upheaval in the cause of the liberty of individual conscience, and expressed itself in the Theory of Law of Nature of the 17th century as established by Grotius. Law was now not a mandate of God expressed through the Church, but found embedded in man's inherent reasonable nature. This Law of Nature made contracts obligatory, and 'Contract' created the State and authorised it to rule and give effect to the Law of Nature by Positive Law. At this stage the Law of Nature included both law and morality; and there was too much oppression of the State and interference with individual liberty in the name of morality and religion. Want of consensus of opinion regarding the contents of human nature (from which the Laws of Nature are to be deduced) and the terms of the original social compact, as also the desire for secular

Examples

Evolution of the Philosophic standpoint and its causes.

liberty of the individual against the State account for the third stage of Philosophical Jurisprudence, in Kant. Law of Nature is now placed on a thoroughly *apriori* footing on the absolute and fundamental principle of liberty, and no longer left to individual opinion; and all legal principles must be abstracted from this absolute principle by rigorous deductive reasoning. Law is further separated from morals and limited to the ordering of the external life. We thus get the Formal School replacing the Rational. The birth of the Historical School, its doctrine of flux or constant change and relativity of Law, and its protest against the abstract formality of Kant's method and the immobility and unreality of the absolute Law of Nature discredited by history, required a further shifting of position; and we thus reach the fourth stage of Philosophical Jurisprudence wherein the doctrine of flux and relativity of Hugo and Savigny, as also the *apriori* and absolute concepts of Kant and his deductive method, are synthesised into the Metaphysical Theories of the 19th century inaugurated by Schelling, Hegel, Herbart, and their associates and followers. We can also trace at this stage of Philosophical Jurisprudence, especially in the Organic School and the Hegelians, the first symptoms of the Sociological idea contemporaneously introduced also into Scientific Jurisprudence for the first time by

Comte. The Individual, whom Kant and his predecessors had set up against the State, comes now to be regarded as an inseparable part of the organic or dialectic totality of the State or Society, having common life and interests as the bond of union between them.

Interaction o the Schools.

The Philosophical and Historical Schools both had their strong-holds in Germany. The historical interest in the study of Roman Law, which took its birth in France and was accentuated there by Cujas and his followers, passed on to Germany and took shape as the scientific study of the history of Law as a national institution in Hugo and Savigny. The two schools soon acted and reacted upon each other on account of their propinquity. With the concession of the Philosophical jurists to the tenets of the Historical School, some of the exponents of the latter yielded ground to the former. Puchta, a direct disciple of Savigny shaped the Historical theory of regular unconscious development of Law after the Organic idea of the philosophers.

The theory of Law of Nature and Social Contract had simultaneously taken root in the Continent and in England as the result of a common cause. The rising wave of Protestantism and the necessity of establishing, by the support of a satisfactory theory, the secular State and its authority to rule independently of the Church, and also of specifying its limitations and duties in the interests of individual liberty, were making themselves felt almost everywhere throughout western Europe; but the theory took a materialistic shape in England, while a rationalistic shape was given to it in Germany. The conservative and practical instinct of the English people formulated itself in the theory of Hobbes, the absolutist Analytical jurist, while Continental idealism and rationalism produced Grotius. The autocracy of the secular sovereigns, however, soon made itself felt more or less keenly everywhere, in Germany, England, and France, and the growing individualism of the subject classes voiced itself, by way of reaction, in the more modernised "Laws of Nature," respectively of Kant, Locke, and Rousseau, according to the metaphysical, political or practical, and idealistic or sentimental temperaments of the three different nations. England soon outgrew the 'Social Compact' doctrine by virtue of her practical instinct, ceased to care much for hypothetical accounts about the origin of States, and assumed the thoroughly political and imperative form in Austin. Germany more seriously refuted it by her Historical doctrine of flux. This last doctrine did not so readily affect the conservatism of English jurists beyond the seas, as it affected the local Philosophical School; but later on, even in England, its influence made itself felt and produced the English Historical School. The English

Analytical School was naturally attracted more by the German Historical School and its empirical scientific method, than by the German Philosophical School, and so in the next race of English jurists after Austin, *e.g.*, Maine, Pollock, Maitland, Bryce and others, we find a combination of the Analytical and Historical methods, and a growing disrelish for the purely Analytical method and the purely utilitarian and Imperative view that had obtained currency in Austin's time. In fact, England has all along successfully resisted, with rare exceptions like Green, the philosophical tendecy which is foreign to the English character. Scotland came more readily under its influence, as any student of Law trained in a Scotch University will testify, and we have in Prof. Lorimer of the Edinburgh University a contemporary jurist who yet subscribes to the theory of Law of Nature in a metaphysico-sociological spirit. We thus observe that the standards, Philosophical and Empirical, Analytical and Historical, which were sharply contrasted with each other at the outset, going through a course of evolution under the influence of the march of history and mutual action and reaction. The Philosophical standards of Grotius, Kant, Hegel, and Kohler are not the same ; the Historical standard of Savigny differs widely from that of Puchta ; and the Analytical methods of Austin and Maitland or Bryce are more punctuated by differences than by similarities. A proper classification, which would offer an intelligent explanation of the modern Theories of Jurisprudence, should accordingly take account not only of the standards themselves, but also of their evolution; so that the host of representative jurists down to the present day, and their ideas, with all important developments, may be laid out in a perfectly logical scheme. I take it that the study of the Theories of Jurisprudence, like Jurisprudence itself, may be Analytical or expository, Historical, or Philosophical, but the study, in order to be thorough, should be not only Analytical, and Philosophical, but Historical as well; for no enquiry, whatever the nature of the subject may be, is complete without a study of its origin and growth; and this is the great truth which has been the lasting contribution of the Historical School to Jurisprudence. There is, moreover, a practical advantage if we first classify the Schools according to the fundamental standards, as indicated above, and then observe how these standards evolved, noting the forces which were brought to bear upon this evolution in course of history; for we, in following this course, automatically secure a fair degree of chronology. A rigorous arrangement of the jurists according to the chronological order is of course impracticable in a scientific classification of the Schools, for

Advantage of combining historical study of the evolution of each school with the comparative study of all schools.

they did not arise, as in the case of successions of kings and royal races of a country or people, one after the other ; but the evolution of each School taken separately, must be chronological. It is clear therefore that the advantages of the Historical or chronological as well as of the Comparative method are combined by the mode of investigation proposed in these lectures.

I do not propose to trace here the evolution of the Theories under the Sociological tendency. I have devoted a separate lecture specially for this purpose ; for the changes are too complex, the landmarks and stages of development too numerous, and the forces of action and reaction and their accompaniments, in the shape of local, social, and historical conditions following after the French Revolution and the American Independence, too subtle and mixed for a sketchy review in an introductory lecture. A cursory glance at Berolzheimer's monumental work on the legal philosophies of the world will convince you that the intricate social phenomena and aspirations of modern days and the infinite variety of the lines of juristic thought, elaborated by a race of brilliant Continental and English jurists, to find the most proper mode of their regulation and adjustment from the points of view of social teleology or of ideal justice, make up a bewildering maze of interlaced conditions and forces in society, and tendencies, methods, and standpoints in Jurisprudence ; and nothing but a most well-considered logical and evolutionary method of study can help the investigator out of a desperate muddle. An attempt at something like an encyclopedia of the jurists, their theories and schools, like that of Berolzheimer is not suited for this purpose. I propose to confine my lectures on the Sociological phases of the older Theories, and on the Sociological School itself, to an examination of the leading ideas and standards and their courses of evolution, in the spirit, and along the lines adopted, as indicated above, with regard to the Individualistic schools ; leaving out of detailed consideration the more accidental and temporary phases which are not only useless for a scientific outline, but often positively cloud and obstruct the horizon of vision of the struggling neophyte. The proposed lectures, I trust, will be useful as an introductory scientific training to prepare the student for the more ambitious works and reviews such as those of Berolzheimer, Miraglia or Roscoe Pound.

Methods of imparting legal education.

This takes me, in passing, to the methods of imparting legal education progresssively in vogue in the continent of Europe.—(a) The books on the Philosophy of Law roughly correspond to the studies of the Philosophical School dealing with the philosophical or *apriori* foundations of legal order, legal systems, institutions and doctrines, and the philosophical and ethical bases of particular branches of the law ; cf. the older works on "*Nature-recht*" ; (b) the Juristic Surveys or "Encyclopedias" which make a systematic or analytic review of the law as a whole, passing rapidly and superficially over its different departments, and are generally supplemented by an introduction, more or less philosophical and historical, explaining the underlying principles and ideas which serve to connect all the branches of legal study into one coherent and interconnected organic whole ; c.f. Gareis' Encyclopedia of Law ; (c) the books on the General Theory of Law which bring down Philosophy from its transcendental and *apriori* pedestal to the domain of the empirical or experimental sciences, and content themselves with ultimate generalisations from the phenomena of legal *and the other social, mental, and moral sciences*, as the most fundamental principles of Jurisprudence attainable the human effort. This has a marked analytical tendency and is encouraged in England in the analytico-historical form, and with a tinge of the historical and philosophical in Germany ; cf. Falk, Merkel, and Schutze. The last, for instance, has a decided metaphysical turn.

Sidelight thrown by them on the evolution of juristic theories.

I have above arranged the three methods in the order in which they have come to be favoured in Europe, and it throws a sidelight on the classification and growth of the Theories and Schools of Jurisprudence which is useful in two

ways. Firstly, it shows that the *apriori*, transcendental or metaphysical, as well as the dogmatic phases of the Philosophical School are now over. Kant's formalism, and even the Organic idea in philosophical speculation do not suit the strong realistic tendency of modern life and thought. Next, it demonstrates that the empirical studies and sciences have considerably widened their scope in all fields of legal enquiry; and what satisfied the highest ambition of the jurists in the time of Hugo and Savigny, to wit, a scientific historical research into the data of Roman Law for the generalisation of jural principles, is now regarded as wholly incapable of yielding the ultimate truths of the juristic science. There has been, in the domain of Jurisprudence, as in other branches of scientific enquiry, a race between Science and Metaphysics; and the former has been repeatedly revising its conclusions in the light of more and more widened research, w
the hope of securing the absolute ultimate truths which Philosophy holds out as her specia
property. The attitude of Science towards Philosophy is, first of all, one of incredulity; f
it denies, or doubts, the existence and possibilit
of *apriori* or transcendental knowledge. I
holds that ultimate and absolute truths ar
inaccessible to man. But in spite of thi
incredulity and despairing attitude of inaccessibility, the search of Science for these ultimate

and absolute truths, in its own way, never ceases. The Historical study of Roman Law and the Comparative study of matured and civilised contemporary legal systems having failed to satisfy the empirical jurists, they began to utilise the results of Ethnological, Philological and Anthropological researches, and allied all the Social Sciences to form a corporation and unite their capitals of knowledge; and so we have the empirical Sociological Jurisprudence of the present day. The Analytical and the Historical Schools have thus had their horizons and methods widened, improved, and amalgamated, and their conclusions enriched and remodelled by contributions from Philology, Statistics, Economics and the other Social Sciences. Even Psychology and Ethics were brought under experimental and scientific enquiry and made to contribute their improved conclusions for the building up of the new Science of Law. The psychic phenomena, hitherto regarded as not amenable to the ordinary methods of Science, were now brought within its scope, and new laws of mind and of its growth in the individual as well as in society, —*e.g.*, of association and imitation—were discovered by physio-psychological investigators (cf. Ward, Tarde and others) of the Sociological School, and new theories have been started with their assistance to explain the nature of Society and its institutions (including Law), and the modes of their development and improvement, which mark a considerable approach towards the Philosophic standpoints and views.

Personification of Society.

Some of these Psychological jurists, (*e.g.*, Gierke, and Jethro Brown) have personified Society with scientific precision. They are no longer satisfied with the Organic theory, but would present Society as a whole as a real person with a real will and mind. Thus, with the growth of Sociological ideas and advancement of the sciences, we now have the Positivist or Mechanical, the Biological or Organic, and the Psychological or Personal theories of Society and Schools of Jurisprudence developed from the older Empirical Schools (Analytical and Historical), who, while professing to disparage Philosophy and its methods, have been always revising and reforming their own methods and conclusions, and somehow or other approaching the philosophic or idealistic positions by fresh scientific researches of a considerably modernised and idealised form. Philosophy of Law has always stimulated, by its criticisms, this progress of the scientific theories and schools by pointing out where and how the conclusions of Science have failed to explain all the phenomena of Law, and the gap that still subsists between these conclusions and the absolute truth. In the meantime, the Philosophical School itself cast off its original dogmatic attitude, which had been throughly discredited by Science, and entered into the critical study, first inaugurated by Kant, of the area and boundaries of the 'knowable.' This was the first concession of dogmatic Philosophy to empirical Science. Kant's constructive programme in Jurisprudence was more faulty than his Critical Philosophy, for it failed to take sufficient account of the actualities of life. His 'Law of Nature' was the 'pure mathematics' of Law. It became 'mixed' in the Hegelians and the Organic School who proceeded, in their constructive Philosophy of Law, to build up a theory which explains the social and legal institutions of real life from the Philosophic standpoint of a central absolute Idea or Priniciple evloving and realising itself in nature. The deductive method and the assumption of an absolute priniciple, peculiar to Philosophy, are still retained; but the descent to actualities, for their explanation, marks its second concession to the demands of the scientific schools. The fundamental problems of Jurisprudence, now commonly recognised by both Schools as requiring solution, included, among others, the complete explanation of the absolute necessary and invariable elements in Law, along with those which were relative and variable; and their mutual relations to each other; and this involved the further question as to whether Law could be controlled, and its spontaneous movement moulded, by the human will rising freely superior to the natural social forces, and made to suit and serve human purposes consciously and freely chosen as ideal; and lastly, the problem of fixing the true ideal itself. The purely deductive procedure of the Metaphysical and Organic Schools of the Philosophic camp, and the faulty induction of the German Historical School from the insufficient materials of Roman Law, were alike unequal to the solution of these problems; while the crude utilitarian and Imperative view of the older Analytical School was hardly scientific at all, and was equally despised by the Philosophic and the Historical Schools. The Schools, however, rendered one important service of pointing out the deficiencies of each other; and the new Sociological idea, just making appearance, supplied fresh impetus for a reshuffling of positions and remodelling of methods. The Mechanical and the Biological or Organic conceptions of Society and Law, first preached to the juristic world by the Philosophical School, were taken up afresh by the Scientific Schools and sought to be worked out for the building up of the Science of Jurisprudence from the Sociological point of view; and the latest researches of all the other sciences, Physical, Biological and Social, were brought in aid of the task. The first results, of these attempts of the Sociological Schools from the direction of Science, were as fatalistic as the earlier conclusions of their Individualistic predecessors. The

Conflict and progress of juristic theories.

Positivist School, the Economic School, the Biological Schools, all ended in conclusions which denied freedom to the human will to assert itself against the natural social forces which build up the fabric of Society and give shape and colour to its institutions. The Philosophy of law, however, was ready with its doctrine of freedom and ideals of right and justice,—of their absolute foundation and end above the sphere of relativity and external nature—and still persisted in its criticism that the fatalistic explanations of Sociological Jurisprudence failed to cover all those phenomena of Law in which the operation of free will acting teleologically for a freely chosen end and ideal was manifest and self-evident. The retort of the Empirical school was, as usual, by way of criticism of the Philosophical assumptions of 'freedom' and the 'absolute,' of the deductive method, and of the insufficient explanation offered by Philosophy of the blind social forces the resistance of which prevents the 'absolute' from freely realising itself in Society and Law. We thus come to the last stage, not only, in the materialisation of Philosophy, in its recognition and acceptance of the conclusions of Science, but also in the idealisation of Science in her desperate effort to solve the riddle of free will and determinism with the help of modern Psychology. The Organic idea is now substituted by the Psychological idea in which the free will and consciousness of the individual is sought to be accommodated and reconciled with the forces which are now supposed to embody the "social will and consciousness." This last position of Scientific Jurisprudence is the high water mark of its advance towards the Philosophical standpoint. The individual conciousness is the ultimate basis of Jurisprudence. The individual will and individual interests are not to be passively merged in the collective will and interests of the society, but they must be balanced with each other; and Law is not merely the automatic resultant of the social forces or of the interests of the dominant class asserting and expressing itself through the Sovereign and the other organs of the State as its mouthpieces, but is also, in part, the handiwork of the conscious and determinate will voluntarily controlling and directing the natural forces for definite purposes and ends which are alike conducive to the interests of the individual and the society. We may describe this stage of thought as harmonising the individualistic and the solidaristic or socialistic views. It explains "innate ideas" by Social Psychology, as the product of universal human experience reflecting itself in the individual, transmitted to the individual by association and heredity. "Free will" is conceded to the extent of autonomy in the choice of ends; and 'Law' of Jurisprudence is scientifically differentiated from the laws of external nature.

The present position of the Philosophical school.

The Philosophic School has, as I have said before, descended again from its Metaphysical stage and shaken hands with the Empirical School. The two schools have taken kindly to each other, and the present occupation of the Philosophical School is the critical examination of the most recent conclusions and ideas of the Empirical Sociologists with a view to infuse into them greater regard for the pure ideals of right and justice. The scientific sociological jurists resolve right and justice to the "balancing of interests," individual and social. This is the material interpretation of right and justice, of the Empirical Schools, to which the Philosophical School naturally objects. Their difference still subsists, as it must subsist till the end, but its shades have become finer. It is now reduced to a competition between the quest for ideal justice and social teleology; and the last word in Jurisprudence will be said when the theories will sucessfully reconcile and identify the rational and philosophic tests of ideal justice with the teleology of social materialism. Mere materialistic balancing of interests is not sufficient, as the Philosophical School points out, to capture the sentiment of respect and the craving for ideals in man, which are necessary factors in Law, and the greatest incentive to obedience. The ideals of perfection and justice can never be dispensed with; and this is the stronghold of Philosophical Jurisprudence from which it has not yet been dislodged. The Philosophical jurists rightly hold that ideals are necessary, for an explanation of the real motive power behind all social and legal development and growth, and for directing the proper application of the Law in concrete cases, if not for testing the justice of the Law itself.

The general trend of growth.

Philosophical Jurisprudence and Empirical Jurisprudence have, as I said before, practically merged, like the Analytical and the Historical, in the Sociological Jurisprudence of the 20th century; and in one sense, the classification of the Schools has, in these days, become simpler. We have now a synthesis in which the jurists of each school have become less confident about the sufficiency of their respective original methods, tendencies, and standpoints, and moderated the extreme views of their predcessors. I had mentioned and explained the three different forms of legal studies encouraged in the Continent one after the other, and I also told you that their respective characters fairly represent the prominent jural tendencies of the times; I now propose to summarise the whole movement described in the preceding paragraphs thus:—From 'Philosophy of Law' to 'Encyclopedia' represents the progress of ideas from the abstract Mechanical to the concrete Organic conception of Society and Law. From

'Encyclopedia' to the 'General Theory of Law,' and from the latter to a fusion of all the methods, as recommended by Post and Muller, represents the growth of the Psychological conception, in which the extreme views of both *apriori* and materialistic schools are moderated, and a harmonious union of the psychic and the physical (conscious or voluntary and unconscious or involuntary) aspects of Law is effected by the application of a synthetic method fairly acceptable to all the schools. The present schools are all of them, "Theorists of Law," or rather, fusionists of all the three methods, with more or less Analytical, Historical or Philosophical leanings.

Causes leading to the unification of the Schools.

We may thus summarise the causes of the present rapprochement of the schools:—(1) development of Comparative Jurisprudence in its broader sense,[1] by all the schools; (2) abandonment by the Philosophical School of the quest for a metaphysical science of absolute principles and substitution of an endeavour to deduce and fix the element of the just in and out of positive law; and (3) the giving over by the Historical School of the view of their founder that the Roman lawyers of the 3rd century A.D. (the "classicial jurists") had such a monopoly of legal genius that modern peoples could do no more than develop the Roman principles by the experiences of life and litigation. Similarly the Sociological School is really the outcome of the progress of ideas regarding (1) the nature of Society and its connection with the individual and the State and (2) the correlation of the classes or 'states in society as between themselves and the Society as a whole, operating on the older Schools. This school is not really a fourth school standing in opposition to the other schools, but, in fact, all modern schools are more or less Sociological, and their differences lie only in the more or less Philosophical, Analytical or Historical turn or twist with which their Sociological ideas are elaborated in Jurisprudence. It has taken shape firmly in France as well as in Russia and Germany, but in Germany the element of power and organisation cherished by German militarism is yet predominant, and the State is allowed to absorb all the functions and forces of the society as the "Culture-Staat." There is greater subordination, or rather, assimilation of the State to the Society in France than in Germany, and this constitutes the essential difference between the German and French schools of Sociological Jurisprudence. Italy continues to be decidedly Philosophical and has not yet overgrown the Metaphysical and Formal tendencies of the older days (cf. Del

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[1] Its method is Scientific, Analytical as well as Historical, and Comparative. It brings in its aid all the Sciences, *e.g.* Comparative Linguistics, History, Biology, Economics, Psychology, Ethnology, &c.

Their present varieties

Vecchio).[1] English individualism has all along resisted the wave of Sociological thought, and there is yet no proper Sociological Jurisprudence in England, where the absolute supremacy of the British Parliament most favours the extreme Individualistic and Imperative view of Law. The American Schools of Jurisprudence follow in the wake of the English from which they have sprung; but in America the Sociological spirit is making itself more clearly visible than in England, and the supremacy of the Courts over the Legislature makes some difference in their Analytical conception of the Law (cf. Salmond and Gray--American school; and Holland—English school). One reason, which can be suggested, of this difference between the English and American attitudes towards Sociological Jurisprudence, is that, in England, the practical necessities and aspirations, newly introduced by the modern social revolutions, and the call for changes in the Law, due to the progress of ethical ideas of social justice in advance of legal justice, have been, in part, met by parliamentary legislation and by the sturdy practical common sense of the British judges who have more willingly accommodated themselves, with greater liberty, to the changing times than in America. In America, the opposition of social and legal justice is more keenly felt; the views of the judges and legal practitioners, trained from their studies of Blackstone into the abstract ethical notions of the older 'Natural Law' groove and with their unbounded confidence, borrowed from the German Historical School,[1] in the absolute perfection of the old Common Law principles which they identified with Law of Nature, very often clash with the modern popular ideas of concrete justice; and lastly the efforts of the Legislature to improve the law are often thwarted by the Law Courts questioning its jurisdiction. This last feature of American society and administration of law, which is absent in England, leads to a sentiment of disappointment and desperation regarding the present state of American Law and Jurisprudence. A keen incentive has thus arisen in the United States to overhaul and build anew the whole system of Jurisprudence and its fundamental ideas which have been tried in the balance and found wanting.

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[1] Italy has nevertheless imbibed the Sociological spirit in Politics and Jurisprudence

Proposed divisions of the lectures.

I have divided the proposed lectures in accordance with the scheme elaborated above, into several parts. The first part deals with the theories which prevailed when the Individualistic ideas of Society and Law were predominant. The theories are divided into the Philosophical and the Empirical or Scientific. The Philosophical theories are again subdivided chronologically into (1) the "Law of Nature" theories of the 17th and 18th centuries and (2) the Formal and Metaphysical theories of the 19th century. The Empirical theories are again subdivided into (1) the Analytical and (2) the Historical; and four successive lectures have been allotted to them, one for each of these subdivisions. In the second part, I have traced the evolution of the above theories and schools under the modern Sociological tendency. The evolution of the Philosophical theories from the Metaphysical to the Organic type represents the rise of the Organic conception of Society and Law, and the rejection of the Mechanical conception which had been entertained alike by all the Schools, Philosophical or Scientific; and one lecture has been assigned to that. One more lecture has been assigned to the Neo-Hegelians and Neo-Kantians, who are the representatives of the new Social—Philosophical theories, and whose realistic idealism or evolutionary pantheism marks an important concession of philosophic idealism to scientific realism. The Psychological theory has also been dealt with in this lecture, as coming midway between Philosophical and Empirical Jurisprudence, and forming their point of closest approach or union. A third lecture has been directed to the evolution of the Empirical theories under the Sociological idea, which being shortly disposed of, I have addressed myself to the subject of the rapprochement and amalgamation of the Theories and Schools, and the variegation of their methods and aspects, both of which have to be accounted for by the rise of the sociological ideas which have the curious characteristic of being alike synthetic and manysided, quite in correspondence with the complexity and extended unity of modern societies. These three lectures, together with that devoted to a general preliminary retrospect of the origin, nature, and growth of the Sociological tendency, make the four lectures coming under the second part. The third part is made up of two lectures, the first devoted to the Sociological School itself in connection with its cardinal principles, and the second to its various subdivisions.

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[1] The German Historical School regarded the Roman Law as perfect The older English and American jurists entertained a similar idea about the principles of Common Law, Roman Law and Common Law were to them what Law of Nature was to the older Philosophical School.

Comparative Theory of Law. Its usefulness

The General Theory of Law, as modern jurists charged with legal instruction understand it, discusses, as I have already stated, the leading general conceptions of legal systems from the points of view of the various schools; and we often find that a well-written work on the General Theory of Law throws better light on the fundamental positions of the different schools than a professed work on the Schools of Jurisprudence. A course of lectures on the modern Theories of Jurisprudence should not, in my opinion, omit to supplement the general description of the Theories and their evolution by a comparison of the views of the Schools on the fundamental topics of Jurisprudence, such as the conception of Law, its origin, and relation to the State and Society, its sources and end; and I have accordingly set apart a lecture, towards the end, for a discussion of these problems from the points of view of the various Schools. It is a useful exercise for the student, after he has mastered the fundamental positions of any School or of some of its noted exponents, to deduce what the conclusions of that school or jurist would naturally be with regard to any particular problem or topic of Jurisprudence, and then to compare with his conclusions, the actual view of that school or jurist as disclosed in the books. Sometimes you may find that the estimated view does not agree with the actual, and this will lead to a further study of the School or the jurist and a renewed consideration of the question in hand; which will possibly end in either a revision of your estimate of the real fundamental position of the School or the jurist, or an explanation of the line of thought of the School or the jurist with regard to the problem as an aberration. There are such aberrations as well in the world of thought as in physical nature; but they must be explained with reference to local, historical and other conditions abnormally affecting the general current.

No study of the Theories of Jurisprudence would be complete if it omits to note the relevancy and bearing of the subject on the practical problems of social and legal life. The real value and importance, in our day, of Sociological Jurisprudence—its peculiar theories of the Society the State and the Individual, its synthesis of Law and Morals, and of the social political and legal sciences, its doctrine of interests, socialised teleology, interpretation of law as a means to an end, and its numerous other theoretical contributions to modern legal science—lies in this that the ideas so supplied by the jurists of this School have mostly been inspired by and directed to the solution of the burning questions as to how the constitution and working of the Legislature and of the Courts of law should be remodelled. They can no longer be left to move in their old grooves and must be overhauled if the new situations and problems of the 20th century have got to be satisfactorily met and solved. The writings of Geny, Ehrlich, Gmelin, Kohler, Roscoe Pound, Wurzel, Alvarez and a host of other jurists and thinkers throw a flood of light on these topics of paramount practical importance from the points of view of the various Schools, and I have reserved my last lecture for a consideration of these subjects. Sociological

Jurisprudence is nothing if not eminently practical; and the bringing together, which it has done, of the most recent resources of Philosophy as well as the empirical Sciences, to work at the practical purposes of real life constitutes its highest achievement and glory.

Charts of Schools and Theories.

I propose also to attach, at the end of the lectures, schemes or charts representing the Theories and Schools, their evolution, interconnection and fundamental positions, summarising the salient points elaborated in the lectures. They are divided into three parts corresponding to the first three parts of the lectures.

The Parts and Lectures therefore are arranged as follows:—

Part I. The Individualistic Theories.

Lecture I. The Philosophical Theories of the 17th and 18th centuries.
„ II. The Philosophical Theories of the 19th century.
„ III. The Empirical Theories (i) The Analytical or Expository Theory and School.
„ IV. The Empirical Theories (ii) The Historical Theory and School.

Part II. The Sociolgical Tendency.

Lecture V. Historical and General Retrospect.

Lecture VI. Evolution of the Philosophical Theories under the Sociological tendency (i) The (idealistic) Organic Theory and School.

" VII. The Evolution of the Philosophical Theories under the Sociological Tendency (ii) The Social-Philosophical Theories and Schools.

" VIII. Evolution of the Empirical *i.e.*, Analytical and Historical Theories under the Sociological tendency—intermingling of methods and variegation of Theories, Schools and Interpretations.

Part III. The Sociological Theories.

Lecture IX. Sociologial Jurisprudence (i) —Cardinal Principles.

" X. The different Theories of Sociological Jurisprudence as representing gradually developing stages in Sociological thought.

Part IV. Some fundamental topics of Jurisprudence considered from the points of view of the various Theories and Schools.

Lecture XI. Ditto.

Part V. Theories on the making and the application of Law.

Lecture XII. Legislation and administration of Justice.—Legal Hermeneutics.

Appendix I. Chart or Scheme of the Schools dealt with in Part I.

„ II. ditto ditto II.

„ III ditto ditto III.

LECTURE I.

PRELIMINARY OBSERVATIONS.

§ 1. *Subject of these lectures.*

Difficulties the subject

The definition of "Law" and "Jurisprudence" has ever been a matter of great difficulty. A rough and ready conception is now-a-days generally formed, when one speaks of "Law," of some general rules, recognised by a community as binding on the members, for the regulation of their external conduct in society,—because such rules are necessary for the permanence, order and peaceful progress of the social life (which every man as a social being universally wants and desires for the realisation and fulfilment of his own inner nature, wants and interests)—and enforced against the members by sanctions emanating from or authorised by the community and backed up by its more or less corporate and organised force. Difficulties, however, begin to appear as soon as the conception is analysed and tested with a view to classification, by logical and scientific methods. The conception itself, as I have put it, although yet incomplete and unsatisfactory, has been a late development—a result of scientific study of

"Law."[1]

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[1] See Holland—Jurisprudence Chaps. II & III. Markby—Elements of Law Ch. I.

ages; and is growing more precise and richer in detail with the accumulation of facts, study and thought. The problem of attaining an exact delimitation of 'Law' is not yet solved; and each step in advance, indicative of closer initiation into the mysteries and difficulties of the subject matter, has been followed by the discovery of fresh difficulties and the rather painful feeling of necessity of further study and if possible, a fresh definition.[1]

Jurisprudence.

It is only natural, that 'Jurisprudence,' the Science of Law, has as yet baffled all attempts at precise definition. Dr. Salmond's luminous classification of Jurisprudence into Civil, International, and Natural, dealing respectively with Municipal, International, and Natural Law and Justice,[2] forcibly points out the futility of attempts to limit the sphere of "Law" and its science within rigid boundaries; for ordinary human usage would, inspite of definitions and warnings of savants, mix up "Law of Nature" with man made laws, and refuse to accept Austin's position[3] that International Law is not *law* but *morality*, for want of a determinate political superior over the heads of the independent states:

Reason of the difficulty

One explanation of this difficulty is to be found in the nature of the subject itself. Law is a body of principles and rules which, by its influence on the human will, serves as a social cement and as a motive force towards social progress. The Social and Psychological character of the phenomena of Law distinguishes them from physical objects which are stable in their form and properties and are therefore more amenable to rigid definition and exact classification, and allies the Science of Law to Psychology as well as Ethics and the other Social sciences dealing with the phenomena of socio-psychological activity in all its departments and varieties. These departments and varieties, from their very nature, overlap and run into each other and are often difficult to distinguish and classify. They are moreover, unstable, at least more than physical objects; they grow and change colour and form so as to baffle all efforts at rigid scientific definition. The science has always to remain alert and develop itself as the phenomena evolve.

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[1] See Del. Vecchio—The Formal Bases of Law. Ch. I.

[2] Salmond—Jurisprudence Chap. I.

[3] Student's Austin—Lec. XLIV. p. 372; Lec. V., p. 65.

Modes of grappling with these difficulties.

Jurisprudence seeks to meet these difficulties in a variety of ways. The Systematic or Analytical jurists,[1] for instance, would chiefly limit their subject of study to the legal systems and phenomena of the modern civilised societies, wherein all laws conform to the standard of commands emanating from the State. The Historical jurists, aspiring to be more thorough and profound, would concern themselves with the legal systems in the process of their historical development. The social rules of the savage and semi-civilised societies, formed spontaneously through the exigencies of social necessity, in which law morality and religion are hardly differentiated, and which are enforced and obeyed without any organised machinery for the forcible execution of Law's penalties, would be accepted by them as a proper subject of study ; and the whole series of steps, by which the evolution of Law reached its present maturity and distinctive character, and which serve to establish the essential unity of Law in all its stages and forms and its affinity to religion and morality, would appropriately come in for their consideration. The "Critical" jurists, on the other hand, would deal more with the future than with the past, expound "the Law not as it is or has been but as it ought to be" and their Jurisprudence is really the Science of Legislation.[1]

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[1] Salmond. Jurisprudence, Ch I.

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[1] Holland. Jurisprudence, Ch. I Salmond Jurisprudence Ch. I. I have, however, elsewhere (see Introductory Lecture) deprecated this narrower view of Critical Jurisprudence, for it is only *one* of the forms of the services of Philosophical or Ethical Jurisprudence which seeks to go behind or underneath all legal phenomena past and present and find out some essential and universal principles of unity ingrained in the very nature of man and human society, by reference to which all juridical manifestations can be not only explained as they *are* and *had been* but also tested by an adequate ethical standard (established in and by reason) indicating their deficiencies and the proper lines of reform.

Theoretical Jurisprudence.

Holland defines Jurisprudence as the "Formal Science of Positive Law."[1] Sir Frederick Pollock criticises this ideal and rigid separation of the abstract or 'formal' from the concrete or material treatment of the legal science—of the science of legal *relations* from that of legal *rules*—as a practical impossibility.[2] A purpose somewhat similar to that of Holland, viz., the exclusive consideration of the underlying principles of law apart from the actual legal rules embodying them, has been sought to be secured by Dr. Salmond[3] by the simpler and more practicable division of Civil Jurisprudence into two parts, viz., Theoretical and Practical, of which the former is described by him as "The Science of the First Principles of Civil Law." He admits that the division is not logical—for the difference is one of degree, rather than of kind—but it is one of practical utility as it sets apart "the more fundamental conceptions and principles which serve as the basis of the concrete details of Law."

Its divisions.

For the purpose of defining the scope of these lectures it is useful to retain this division along with the other division, also proposed by Dr. Salmond, of Law into Civil, International and Natural; so that Theoretical Jurisprudence would constitute the Science of the first principles, not only of Civil, but also of International Law as well as of Natural Justice (Natural Law) in all its three divisions: Systematic (Analytical), Historical and Critical (Philosophical); based principally, as explained in the introductory lecture, on the different standpoints (Philosophical or Scientific) and methods (Analytical or Historical) employed for its treatment. Dealing, as it does, with the fundamentals of Law, it can not help investigating the ultimate unity subsisting between all kinds of Law, and examining how the later differentiations arise, logically as well as historically, out of the common basis.

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[1] Jurisprudence, Ch. I

[2] Essays in Jurisprudence and Ethics, p. 4.

[3] Jurisprudence, Ch I

Theories of Jurisprudence

The "Theories of Jurisprudence" embody the most general and fundamental conclusions of Theoretical Jurisprudence. We speak, for instance, of the "Wave theory of light," the "Atomic theory of matter,'' or the "Ptolemic or Copernican theory of the universe;" these theories express the ultimate generalisations attained by the physical sciences in their respective departments, and the other truths of Physics, Chemistry or Astronomy may be regarded more or less as corollaries or special applications of the supreme principles. Similarly we have, in Jurisprudence, a body of ultimate truths which account explain and for the other relatively minor principles governing legal relations of men in society and give us the final results and conclusions regarding the na origin, sources, and contents of Law, its relation to other social rules, its aim and object, mode of operation, its final form or goal, and the lines of its development. In fact, the theories comprise the final and ultimate generalisations reached by jurists of different schools about the origin, form, contents, function and object of Law and its evolution.

Diverger of these theories, a the utility their study

These theories have been divergent since the birth of the modern era. Different schools of jurists have approached the subject with different tendencies or from different standpoints, and have applied different methods ; and the results of their labours had, therefore, naturally been divergent. A critical and comparative study of these theories, with a view to find out the elements of truth in each, would be not only useful in the cause of the Science of Law, but also fruitful of principles to guide us in the practical work of legislation, and administration of justice.

Philosophy of Law ar the Theor of Jurispr dence.

Before concluding § 1, I must say a few words about the Philosophy of Law and its connection with the Science of Law and Juristic Theories. The sharp distinction usually drawn between Philosophy and Science since the days of Bacon turns really more upon their methods rather than upon their conclusions. As explained in the introductory lecture, they differ in their standpoints, but their object is the same. In the quest after truth and knowledge, humanity aspires after unity for an explanation of the diversity. This unity,—some general principle to which the variety of observed facts may be referred as their cause or explanation—is the goal alike of Science and Philosophy. Of the faculties exercised for the search of this unity, Science rejects imagination as erring, and relies only on the senses and reason; or rather, on the observation of the outer senses guided by reason. Philosophy often mistrusts the senses and relies more on abstract reason and the inner senses untrammelled, as much as possible, by the shifting and misleading evidence of the outer senses or perception. Play of imagination and idealism naturally are more prominent in Philosophy; and with these supplying the data in the shape of metaphysical truths, other truths are derived by deduction; and they serve as standards for testing the validity and worth of the facts observed in the world outside. In fact, neither realism nor idealism can alone do the whole work. Scientific theories must borrow a good deal from imagination or intuition and philosophy likewise can never ignore the facts of real external life; the difference is one of degree, not of kind. With our limited powers of observation and knowledge, ultimate truths hidden from man must be guessed. The seers would invoke religion, revelation, superconsciousness, and other similar sources of knowledge to justify and support their teachings of these ultimate truths; and so long as Science has no facts of the world of observation to disprove them, it must either tentatively accept these truths of Philosophy or leave its quest after ultimate truths incomplete. Modern theories (*e.g.*, of ether, protons, and electrons, like the older theories of light, heat and electricity), even in the department of Physical science, have had their idealism and guesswork when they soared high enough towards the ultimate generalisations. The experience of investigators corroborates the truth of the position that highest generalisations oftener dawn intuitively upon the expectant and searching consciousness before the facts necessary for their corroboration or verification are collated; or, in other words, Philosophy descends to lend a helping hand to aspiring Science, and both meet in the plane of ultimate generalisations or Theories. Theories of Jurisprudence therefore constitute the meeting ground of Philosophy of Law and Jurisprudence; and the various kinds of the Theories of Jurisprudence,—Philosophical, Historical, or Analytical—are all, in a more or less degree, both scientific and philosophical. Every individual, as every system or school of knowledge, including Jurisprudence, has some Philosophy; for man can not go without it. Philosophy is a part of his nature, for he can not rest so long as knowledge of facts is not assorted and arranged in a scheme resting ultimately on some fundamental unity of principle or thought.

§ 2. *Retrospect of the Theories of Jurisprudence in Europe down to the dawn of the modern era.*

A. PRE-SOCRATIC PHILOSOPHY.

No Jurisprudence in Europe before Greek Philosophy.

There were no vestiges of any Science of Jurisprudence in Europe before the development of the Greek Philosophy. "For scores of centuries," says Dr. Lee, "the science of Jurisprudence was non-existent; and yet in no year of this diuturnity did the fundamental principles of juridical science cease to develop progressively."[1] This development, however was spontaneous or natural. Appearing at first as a few simple customary rules, without which even the rudest type of communal life could not be possible, Law may be said to be coeval with society. Each little society, standing by itself, is at first governed by its simple rules of life, which grow in detail variety and complexity as the society develops. With the adoption by the members of the agricultural in place of the pastoral life, by the introduction of commerce and industries, and under the influence of contract, and intermingling with other societies, races and nations, brought about by trade or conquest, the society enters at each stage into of physical nature, the Hylicists suggested in turn 'water' (Thales), 'air' (Anaximenes), or a chaotic primeval matter (Anaximander) as the first and permanent fundamental principle. The perceptual view of things characteristic of the primitive man still dominates here. The conceptual attitude of mind, indicative of higher civilisation, first appears in the Pythagorean philosophy of 'Number'; and his school attempted.to explain not only points and dimensions, *e.g.*, lines, surfaces, and solids (including celestial bodies and their motions), of the material universe, but also psychological subjects, including 'justice' and 'transmigration of souls' by the symbolism of number. His definition of justice as the "equal multiple of itself" has been interpreted (by Aristotle) to mean equalisation, reparation, or retribution. However vague and unfruitful may be this first philosophical attempt to lay down an objective criterion[1] or basis of justice, it is a marked advance on the Theological conception of Themis or Dike which impliedly admits the incapacity of the human intellect to apprehend the true nature of 'justice'. It is, however, yet representative of an age when the later doubts of subjectivism, as to whether justice after all is not shifting variable and contigent and whether such an absolute and objective criterion of right and wrong does or can exist at all, had not yet appeared in the world of thought.

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[1] Historical Jurisprudence.—Introduction, P 1.

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[1] See Berolzheimer—Legal Philosophies. P. 52

Trend towards idealistic from materialistic monism.

This subjectivism, however, soon made its entry into Greek Philosophy. From the physical and materialistic standpoint of the earlier section of the Ionic School, the reduction of all qualitative differences in matter to form number and adjustment of parts in space and time of the Pythagorean was a step towards mathematical idealism, or at all events, towards abstraction. This abstraction was carried to its furthest limits by the Eleatics, with whom the first principle, or rather, the only reality was pure 'being' or 'existence,' independent of space and time, and without any qualitative or quantitative character beginning end or change. "All being is one God," said Xenophones. It is pure "thought" said Parmenides, —"the only true and infallible knowledge." The phenomenal, changing, and multifarious world is an illusion; and Zeno sought to prove the self-contradiction, and therefore, the unreality of all multiplicity and movement of the phenomenal world by logic (dialectic) and mathematics. The Eleatics were opposed by the Heraclitians who held that this shifting phenomenal flux is the only real principle, and there is no stationary unchangeable reality apart from or behind it. The error or unreality of the world consists, not in the changing or transitory character of its objects, but in the deceptive appearance of stability or permanence which in reality no where exists. They thus posit 'fire,' 'energy' or the principle of 'flux,' change or 'Becoming' (as opposed to the Eleatic's 'Being') as the only reality. The two schools, (the Heraclitians and the Eleatics) stand respectively for something like our 'Prakriti' and 'Purusha' to the exclusion of each other in their monistic attempts at the explanation of the world.

Failure of monistic theories. Synthetic dualism of Empedocles

Neither the earlier physical and mathematical, nor the later antithetical and abstract monistic theories of the Ionics, Eleatics, and Heraclitians having satisfactorily solved the undoubted dualism in nature—the antithesis of unity and diversity, substance and flux,—ecclectic attempts at synthesis of the prior theories were next made by Empedocles who posits an absolute unity in 'Sphairos' (Eleatic 'Being')[1] underlying four primordial elements,—water, air, fire, and earth—which are disintegrated from their original unity by the force of 'Strife', and integrated again in infinity of ways by 'Love', to constitute this ("Becoming") manifested universe. Thus neither 'Being' nor 'Becoming' can be denied altogether, but both are sought to be explained by the theory of a metamorphosing force operating on the eternal substances in opposing directions, as attraction and repulsion, love and strife.

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[1] See Schwegler's History of Philosophy.

The dualism of the Atomists.

The Atomists (headed by Democritus) substitute an infinitude of primeval extended but impenetrable atoms, of different shapes sizes and weights, but without any qualitative difference, (*per contra*, the four elements of Empedocles) and empty space not filled in by the atoms,—the 'plenum' and the 'vacuum'—for the 'Being' and 'non-being' that make up the "Becoming" of Heraclitus. With them 'Becoming' is the result of the evershifting movements,—conjunction and disjunction,—of the atoms in space under an inherent necessity predestination or chance. They destroyed the last vestiges of the influence of Theology, and replaced the mythical powers of "Love" and "Hate" (of Empedocles) by the conception of a materialistic blind force as the main spring of the world-processes.

A decidedly idealistic turn given by Anaxogorus

The scientific inadequacy of the Atomistic theory in assuming the indivisibility of corporeal and extended atoms did not attract attention till the time of Aristotle; but its want of any explanation of the existence of design in the processes of nature was soon perceived and sought to be remedied by Anaxogorus' doctrine of "Nous." There was a world-forming intelligence (Nous) absolutely separated and free from matter; and along with it, the equally original mass of atomic seeds ("homoiomerci") of individual existing things, *e.g.*, stone, gold, bonestuff etc. The Nous sets up a perpetual vortex of motion in the atomic germs which lay in chaotic confusion, and the cosmic order of the world, with the immanent Nous evidenced as the animating soul in all living beings, is the result. The conceptualism, begun with the Eleatics, is thus given an idealistic turn, marking the end of the materialistic realism of pre-Socratic Greek Philosophy. The 'Nous', however, does not come up to the idea of 'pure soul' connoting (like the 'atman' of the Hindu philosophy) absolute immateriality, but corresponds rather to the 'manas', or 'mind', guiding the movements of matter with a design or purpose. The idealism is yet incomplete.

Subjectivism of the Sophists—its causes. The theory of knowledge.

The uncertainty of natural philosophy due to the diversity of the schools, as indicated above,—the essential mutability and want of any point of arrest or stability in the eternal flux and self-contradiction of the manifested universe, driven home into Greek thought and culture since the days of Heraclitus and Zeno,—and the loose Greek social and political atmosphere after the Peloponnesian war, wherein unbridled egotistic self-seeking of each individual was the rule of life, fostered the subjectivism, preached by the Sophists, which implies that there is no objective reality or standard of things and qualities, but every thing is relative, good or bad, right or wrong, real or non-existent, according as it appears to the subjective consciousness, for the time being, of each individual. The motto of subjectivism enunciated by Protagorus, "Man is the measure of all things," negatived all criteria of knowledge, truth or validity, except the subjective perceptions and feelings of the individual. Different persons have different perceptions and feelings, and even those of the same person vary at different times and circumstances; and hence "there are no such things as any objective affirmations or determinations whatever." The Sophists, however, it must be admitted, were the first among the philosophers in Europe who directed their attention towards the Theory of Knowledge. "They show that truth cannot be found by natural knowledge because phenomenon is variable and contradictory. The reality of things is different from our knowledge, and therefore thought is only a belief."[1]

Legal Theories in pre-Socratic Philosophy.

The original theory, of justice as buried and hidden in the laps of the gods and revealed to men by oracles or in the 'themistes' of inspired kings, was based on the popular religion. The theory, along with the religion itself, was soon discredited. The mythological gods and goddesses and heroes, whose examples might be alleged in justification or excuse of the greatest vices and the vilest actions, ceased to attract the educated and satisfy their awakening culture ; advancing Science disturbed tradition, and natural causes were often detected to explain facts hitherto ascribed to direct divine agency. Then came a period of transition and dissolution. The newer philosophical theories had not yet matured. The attempt at the formulation of the objective principle of Justice by Pythagorus was too indefinite ; and the other philosophers had hardly formulated any theory at all. In the void, thus created, the subjectivism of the Sophists gave rise to a negative theory of justice and morality, *viz.*, that nothing is by nature good or bad but only by positive statute or agreement. One's own desire and advantage is the sole test of one's ethics : and law and right is the standard only fixed by the strong, with their might, prescribing arbitrary limitations on the weak.

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[1] See Miraglia—Comparative Legal Philosophy, P. 2.

B. SOCRATES, PLATO AND ARISTOTLLE.

Socrates : his philosophy of objective thought : universal as opposed to egoistic subjectivism.

The Sophists ushered into Greece its age of illumination (Aufklärerei), substituting free reflection in the place of unreflecting emotions and faith in obedience to the ancestral civil and religious institutions—the simple 'naivate' of the infancy of a people. This free-thinking, as handled by the Sophists, led, as we have seen, only to destructive subjectivism. Socrates

(468—399 B. C.) directed subjectivism towards constructive ethics. He first of all turned Philosophy from the investigation of external nature towards that of man's inner moral nature.[1] "Know thyself" was his motto. He sided with the subjectivism of the Sophists in so far as they preached that right and wrong should depend on the inner judgment of man, (and not on objective arbitrary standards set by the might of the strong) and established the principle of free will and self-conviction. The Sophists, however, set upon the throne "the contingent will and capricious judgment of the individual" which was erring, interested, and variable, and could not therefore afford any valid test of right and justice at all. What is right, good and true does not depend on any single person's opinion pleasure or will but is determined by universal thought and reason—the thought and reason common to all rational beings—from which elements of error introduced by individual contingencies have been eliminated by a process of education. The judgments of individual men would all agree if these contingent individual elements causing error and difference were threshed out by comparison of the common or essential and the variable elements; for the rational nature and thought of man thus freed from its impurities is one and universal. This laid the foundation of conceptualism, objective subjectivism, or the philosophy of universal and (therefore) objective thought. Socrates thus introduced into subjectivism the method of induction and logical definitions.[1] Particular concrete examples of each of the virtues, *e.g.* justice, fortitude, etc., were taken, analysed and compared, and by gradually separating and casting out what was contingent and accidental in these particulars, the universal essence or truth underlying each virtue was brought out to form a notion, *i.e.*, a universal concept exhibiting the logical unity of its various forms in actual experience.

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[1] Plato—Phædrus.

His definition of virtue as knowledge. Virtue is teachable and all virtues are identical as right acts resulting from knowledge.

The concepts of the specific virtues being thus found out by intellectual discernment of the underlying notion of each through a process of inductive study of the particulars, virtue in general must consist in this intellectual discernment which is the common factor in all virtues. Virtue accordingly is knowledge—perfect knowledge, or wisdom,—which arises out of instruction or inductive study of things and acts, and reaches the universal notions underlying them. It is want of knowledge that leads men to vicious acts. All virtues are one and identical, for they are right acts resulting from knowledge directed to different objects; and further, virtue being knowledge acquired by inductive study and training of the understanding, is teachable.

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[1] Aristotle—Metaphysics XII. 4.

Estimate of Socrates' contribution to Philosophy and Ethics and Law.

Socrates thus laid the first stone of a scientific theory of morals, and based it on the understanding instead of on faith or the emotions;—not the understanding of any particular individual, but the trained discerning understanding of the ethically normal man representative of all good citizens (cf. Roman bonus paterfamilias) He, however, did not elaborate this theory of morals into its concrete details, nor work out a scientific mode of evaluation of the proper ends or motives of human activity. With reference to the former, he simply held that the laws of the State and unwritten universal usage determine right action and justice; and with regard to the latter, he accepted the popular objects and motives which influenced the people around him—happiness, power, honour,—pointing out that to work with knowledge at these ends was virtue. More orthodox than the Sophists, he did not stand against the national religion and its established observances, nor against the national laws. In fact, in this, he did not carry forward his philosophy beyond the first step to its legitimate consequences; but still he suffered his sentence of death for the sake of his new Ethics of "Knowledge" which smacked of heresy. In his life, he evidenced freedom from sensuous greed and cravings, and a calm equilibrium of mind arising from its lofty independence of desires, which, more than his formally preached ethics, acted for long as an exemplar, and suggested philosophies which cannot be properly affiliated to his discourses and dialogues.

The Incomplete Socratics.

After Socrates, some of his disciples laid stress on particular phases of the Socratic teaching and life, and formed different schools of thought. They may be called the "Incomplete Socratics." The Cynics, by idealising the Socratic life, preached absolute indifference to, and renunciation of, the desires and pleasures as the goal of life.[1] The Cyreniacs, on the other hand, adopted the principle that felicity or pleasure (identified, or rather coordinated, by Socratics, with 'Virtue') was the goal of life; not indeed what is derived by uncritical pursuit of the momentary desires and impulses of the senses, but what was sanctioned by knowledge. Justice, they held, is the result not of nature but of artificial enactments; and the wise man, acting with knowledge, may sometimes disregard them.[2] The Megarics, leaning more towards theory than practice, subordinated the Ethical conception of the 'Good' to the Philosophical one of 'Knowledge' and 'Being.' According to them, the ultimate dialectic or philosophical generalisations—'Being' 'Unity,' "pure intellectual and not sensuous Knowledge, Thought or Reason and Truth" are all identical with each other and with the ultimate ethical generalisation, *viz.* "Virtue or the Good." This is the Eleatic conception of "Being" combined with the Socratic conception of 'Virtue'; and it considerably influenced and moulded the fuller philosophy of Plato.

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[1] They repudiated civilisation and its institutions—government, marriage, or property, and advocated a return to Nature. See Berolzheimer Legal Philosophy, Art. 16.

[2] Berolzheimer—Legal Philosophy, Art. 16, P. 75.

Plato's synthetic philosophy of "Ideas" and "the Good."

Plato (429 to 347 B. C.) utilised the pre-existing philosophies for building up a superstructure of synthetic philosophy including Dialecties, Physics, and Ethics as also a philosophy of Law on the Socratic foundation. The "universal notions" of Socrates were, to him, only psychological concepts representing the essential logical unity of things belonging to a class. Plato, identifying knowledge or 'thought' with 'being' as the subjective and objective aspects of truth or reality, objectivised these 'notions' into Ideas, and held them to be metaphysical realities,—the immutable and permanent archetypes of the things of this unreal world. These 'Ideas' form in the world of realities, a graduated series (in which a higher and more general 'Idea' comprehends lower ones), terminating in the highest Idea, "the ultimate in cognition,"—the metaphysical idea of the "Good"—which is the ultimate goal at once of knowledge and being. The Socratic "notion," or ethical conceptuation is thus

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synthesised with the Eleatic 'Being' as in the Megarric philosophy of 'Being' and 'the Good.' He accepts the truth of the Heraclitic doctrine of 'flux' of the world of sense; but holds that it is unreal, "non being"—the antithesis of the real immutable and permanent world of Ideas—the result of the 'Ideas' imperfectly reflected in the unreal matter of this world of preception. Plato raised the 'universal' notions of his master from mere psychological conceptions to the position of objective and metaphysical realities, which he held to be the only real permanent Eleatic "Being"; while the objects around us were but variable imperfect and transitory copies or reflections of them cast in the matter of this phenomenal world which was essentially unreal. The world of "Ideas" eternal essences or reality is apprehended through reflection or 'thought' by means of reason; while the shifting and deceptive world of appearances is perceived by the equally unreliable senses, as 'many', 'divisible', 'shifting', and 'transient.' The actuality of matter is denied, and it is likened to space; but in so far as this substrate of matter is held to receive the ideal 'forms' to constitute the sensuous world, the idealistic monism of Plato's dialectics yields somewhat to dualism, and hardly rises to the absolute negation of matter connoted by the "Non-Being" of the Eleatics.

Plato's Physics and Ethics.

Plato's Physics is the synthesis and elaboration of the Ionic theories of the four elements, the primordial chaos of matter, and Anaxogorus' theory of 'Soul'. The universal Soul (cf. the Holy Spirit of Christian Theology) comes midway between the absolute Reason or Good (cf. God of Christianity) and matter, as the creative and ordering force, which, entering into the latter, raises out of the chaos the cosmos of the inorganic and organic world. It breaks up into a plurality of individual souls which are, like the 'Nous' itself, universal imperishable entities (as participating in the essence of Reason or "the Idea,") but clothed in perishable matter, swayed by the lower life of sense, and forgetful of their higher origin in absolute reason. They nevertheless retain their aspiration to reach up to their proper height in the supreme good, freeing themselves from the matter and senses and their lower attractions, which marks out the line of individual Ethics. The influence of the Pythagorian doctrine is noticed in Plato's elaboration of the doctrine of transmigration and the dialectic of 'one' and the 'many'.

Plato's Philosophy of Law: The Theory of the State and Justice.

What directly interests us, at the present moment, is Plato's Theory of Justice and the State, which constitutes his contribution to the Philosophy of Law. The individual virtues of the head, heart and the stomach, *viz.*, wisdom courage, and temperance, all depend on knowledge, which constitutes their logical unity; and the virtue that, guided by wisdom, coordinates and regulates all the individual virtues and faculties, and brings about harmony in the real practical life of the individual as a member of the society, is Justice. Justice, therefore, is the cardinal social virtue comprising actualising and coordinating the individual virtues, and the atmosphere wherein this Justice or coordinated realisation of the individual virtues is fostered is that of the regulated society or State. Plato's "Republic" or "State" is the "Idea"—the conceptual or notional reality—imperfectly actualised in the states he saw around him. For the delineation of this perfect or ideal State wherein the moral (*i.e.*, individual) virtues, constituted by the subordination of individual sense-desires or interests under the guidance and control of intelligence, were all universalised, *i.e.*, posited to be present in all individuals, and coordinately directed towards the attainment of the common good, he was led, by his whole philosophy, to emphasise the wholesale merger of the individual—of all subjective will and activity, property, education, interests and desires of individuals—in the State, (*i.e.*, of the many in the one), to be left entirely under the disposal, guidance and control of the unrestrained authority of the presiding authorites; who, however, must consist of the philosophers, full of the true political knowledge, wisdom or virtue. The State, like individual, is divided into the ruling class representing the head dominated by the virtue of reason, the fighting class which corresponds to the heart acting with courage, and the working class—the stomach or appetite—working for supply with temperance or moderation. The special qualities of the classes composing the State, properly coordinated and acting in union in the whole body, give rise to Justice, which represents the systematic articulation of the totality, the organic distribution of the whole into its moments.

Plato's Ethics and Philosophy of Law compared with the tenets of Christianity and Sociological Jurisprudence.

From a consideration of the facts that Plato advocated slavery, did not direct himself to the question of the amelioration of the lower classes, and absorbed the whole life of the individual and his education within the state leaving little or nothing to his own free spontaneous activity and initiative, some shrewd observations have been made [1] that Plato's Philosophy of Ethics and Law, as typical of all Greek Art and Culture, was meant only for the 'noble' man of independent means and high culture, and not for the average or lowly man with his blemishes, sorrows, and difficulties; and further, that it did not sufficiently value the worth of man as an individual, in denying him an independent sphere of activity or freedom for self-development outside the 'aegis' of the State which, octopus-like, smothered him by its all embracing grip. In these respects, Plato's Ethics, it has been urged, differs first, from Christian Ethics, and next, from modern Sociological Jurisprudence. It should be remembered, however, that, following Socrates, he not only refuted the Sophistic doctrine that law is imposed by the strong or that might is right, but held that the source of Law or reasonable regulation is in God and Nature, and the essence of Law and Justice is in Reason. Law fixes the order of things inside the state and Justice or just conduct requires every man to do his part accordingly. In his idealism in Ethics and Politics, he did not contemplate any possible collision between the reasonable laws of the philosopher—ruled State and the reasonable needs of the individual ; nor any hardship arising from the absorption of the individual in the State so conceived. The individuals and the State constitute 'the many' in 'one,' and are both identical in essence and reality. Moreover, the society must always retain, after the 'Idea' or 'ideal' of which it is the copy, its class distinctions, as the individual his different organs, with their different assigned functions and appropriate culture and virtues. Platonic Philosophy is for keeping up this order; and it is hardly fair to accuse it of exclusive attention to the 'noble man,' when really, it only assigns the highest culture and and virtue for him in accordance with his position in the economy of the State. The State is, moreover, not merely an institution for preserving order, but is also an educational institution, for the progress of the society towards the attainment of the ideal. This anticipates the 'culture—staat' of the modern German Jurisprudence.

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[1] Berolzheimer—Legal Philosophies, § 14.

Aristotle's Philosophy of "Form" and "Matter" and its relation to Plato.

Aristotle (384—323 B. C.) is inverted Plato. His Philosophy is that of Plato's turned over on the other side. It has a decidedly more empirical character. He denies the objective reality of Plato's 'Ideas' independently of the objects of sense, and points out that they, being held by Plato to be immobile, cannot explain the genesis of the material world. He offers as a substitute his doctrine of 'Forms', which are not actualities sundered from matter, but, throughout inherent in matter, fructify its potentiality and give to it its particular 'forms,' *i.e.*, individualities or peculiarities of shape and function. The Form remains latent at first as the efficient cause, (as the tree in the seed), and gives direction to the transition of matter from the potential indefiniteness to the actualised (formed) thing. So it is never dissociated from matter, but remains inseparately connected with it, both as the logical (notional) prius and as the final end. Hence it is, in fact, Plato's 'Idea' only drawn into association with matter and invested with active propelling force and function. The dualism of matter and spirit is sought to be obviated by Plato idealistically, by ascribing unreality to matter; by Aristotle realistically, by describing matter as the potentiality or possibility of 'Form.' Plato attaches greater importance to the Eleatic "Being" —what is; Aristotle to the "Becoming," *i.e.*, what becomes and how. In the speculative philosophy of the absolute—the God as the permanent self-identical reason,—Plato rises higher than Aristotle; who, in seeking a more intelligible theory of the world of senses, makes his doctrine of 'Forms' less adaptable to the explanation of the supreme and perfect.

Aristotle's Ethics.

Plato derived Ethics from Dialectics, and individual virtues from knowledge (or 'Idea') of the essence or reality of things *i. e.*, the absolute Reason or Good; Aristotle, more realistically, derives them from the study of sensuous nature. Virtue depends, not on knowledge, but on the nature tendency or character of man; and is fostered, not by teaching, but by exercise or practice; and consists in the right proportion in action, avoiding too much and little, by observing the due mean. It is relative to persons, (*i.e.*, is different for different persons) and circumstances. Virtues fall into two classes:—those of the practical life, concerning passions and affections; and the higher virtues of the soul, of which the highest is wisdom and leads to supreme felicity 'perfection' or 'happiness,' which, in the graded series of human purposes, is the ultimate goal of life and action. Here again, Aristotle is only Plato levelled down or materialised, to suit his philosophy to the practical affairs of life; but it has become faulty in the attempt, for the theory of 'the proper medium' is hardly applicable to the higher virtues of the soul or intellect.

His Social and Legal Philosophy.

Aristotle is at one with Plato in holding that man's training of the natural character, by exercise of the virtues, into the moral can only take place in the external medium or atmosphere of the State. Aristotle's dictum "man is a social being" is supposed, (*e.g.*, by Grotius, who often quotes Aristotle in support of his theories) to base a theory of the origin of State and Law on the social nature of man.[1] He, indeed, traces the steps by which the States were formed, *viz.*, how individual households clustered into the village community, and then, the latter into the "City." This is the statement of a historical fact observed in nature; but his philosophy would regard the State as the 'Form' potentially existent, from before its actual realisation in the 'matter' of the individuals households and communities; and the actualisation itself, as a process of nature. The

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[1] Berolzheimer—Leg. Phil. § 15

'rational or social nature of man,' as used by Aristotle, refers to this process of nature which builds up the State by the social organisation of men. It is only Aristotle's general philosophy stated with reference to the subject in hand. Both Plato and Aristotle were exponents of their age; both philosophised on what they saw round them. The Greek city states, unlike the modern states, were natural units made up of homogeneous elements united by community of race, religion, origin, culture, language, and strong civic sentiment. There was no keen antagonism of the classes, accentuated, as in the present days, by economic difficulties, which were then absent; but they adjusted themselves smoothly and ungrudgingly in their respective positions in the social fabric, like the separate organs in a human body, to secure its political safety and serve its ethical mission of fostering the perfection of the citizens. The organisation itself, as well as the merger therein of the individual, and the favoured position of the privileged upper classes, all appeared so natural that there was no occasion to elaborate a theory formally justifying the existence of the State and its dispensations.

Law, Justice, and Equity.

Plato's theory and definition of Justice and Law were barren; and aimed mainly at the preservation, by the individual, of *status quo* in the preexisting disposition or order of the society. Aristotle marks here a decided advance of ideas. He defines Justice, consistently with his definition of Virtue, as Equality ; *i.e.*, avoiding too much or too little in the despensation or distribution of things, and readjusting or compensating, were this balance has been disturbed. Justice must be adapted to circumstances—being absolute equality, in the administration of law between man and man, and relative equality, in rewarding merit and punishing guilt and distributing goods according to individual needs and circumstances. Justice is of two kinds, natural and conventional ; based respectively on reason common to all men, and positive authority. Law itself should aim at justice ; but where the Law, being a human creation, is defective, or where, being necessarily general and adjusted to ordinary circumstances, its application in special cases would work unfairly or cause hardship, the Law is to be improved or supplemented by Equity, so that formal conventional justice may coincide with material or natural justice. Aristotle plainly lays down that right and justice, and nŏt arbitrary power, constitute the foundation and essence of the State; and that laws limit the power of the Government where it is not tyrranical. Aristotle's elaboration of the conceptions of Justice and Equity, and of the theories of the State and Government and Law and their functions, is an outstanding feature of his philosophy; and his contribution in this direction is far more valuable than that of any of his predecessors.

C. POST—ARISTOTELEAN GREEK LEGAL PHILOSOPHY: STOICISM, EPICUREANISM, AND SCEPTICISM.

Decadence of Greek life and thought

There was a general decline of Grecian life, conduct and philosophy after Aristotle. Decay and ruin of Grecian politics and art, and irresponsibility in political religious and social life characterised the years that followed after the death of Alexander the Great (356-323 B.C.). The irresponsible subjectivity and doubt and disregard of any objective rule of life, indicative of unsettled life and thought as in the days of the Sophists, which had been controlled by the masterful philosophies of the three great world-teachers and the strong rule of the Macedonian kings, reappeared; and Post—Aristotelean philosophy branched out into different schools under different leaders who, like the "Incomplete Socratics" before them, diversely sought to give it a lead in what they respectively regarded as the right direction, and keep it out of the way of evil. Roughly speaking, Stoicism, Epicureanism, and Neo-Platonism may be affiliated respectively to the Cynic, Cyrenaic and Megaric modes of thought of the 'Incomplete Socratics.'

Trend of Post-Aristotelean Philosophy.

The work of Philosophy was now more directly and earnestly directed towards Ethics, to find out the practical duty of the 'Ego' or subject; and Dialectics and Physics were subordinated to it as auxiliaries meant for finding out man's true relation to the world. Explanation or philosophic knowledge of the world-system was now regarded as valuable, not for its own sake, but as necessary for finding out man's true path for attaining his highest bliss. With the decay of the scientific spirit, dogmatism gathered strength; and dualism, as it accentuates the difficulty of the relationship of the subject and the object, was held at a discount. The 'thing in itself' was less important than the subjective impressions it produced on the subject; and Philosophy was called upon to point out the right ethics to be gathered from the lessons of these experiences, instead of launching into speculations about 'notions' 'ideas' or 'forms.'

The Stoic doctrine of Nature.

The Stoics[1], like the modern Scotch philosophers, leant towards dogmatic realism and accepted the subjective conviction carried by the clear sense impressions of the external things as the proof of their reality. They avoided dualism by urging that things are all material, *i.e.*, have bodies of some sort or other; —even soul, spirit, and God have bodies; for no action is possible between absolutely unlike substances, *e.g.*, incorporeal spirit and matter. This led to their celebrated conception of the world as a prodigious living being, of which the passive and mutable exterior was matter, and the inner active principle which produced, pervaded, animated, and ruled it was the rational universal soul or reason, which is God. Nature, in its two aspects, the external universe representing the body, and the inner, universal, permeating, and ordering reason or God (sometime afterwards called divine breath, fire or ether), constituted a unity; of which, every individual or thing was a part, incapable of independent existence or isolation from the whole, and bound to obey its settled order—the divine order or Law of Nature; in accordance with which, the life and movements of the entirety and of the parts were guided sustained and inspired, in a perpetually repeating cycle of constant origination and decease (*i.e.*, merger), as under an eternal necessity.

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[1] Founder—Zeno (340 to 208 B. C.)

Freedom of will and necessity.

There was thus very little scope for freedom of will of the individual in this fatalistic doctrine of Nature. Our only freedom, according to the Stoics, is in forming our opinions and notions about objects, our affections desires and aversions; but, even here, the freedom does not amount to indetermination of the will, *i.e.*, its absolute superiority over motives or causal antecedents, but only to the power of doing or acquiring what we in fact will to do or acquire. We have no such freedom in the sphere of things outside our subjective consciousness;—no power, for instance, to do or acquire whatever we will or desire regarding our bodies, wealth, rank, etc.

Virtue, Happiness and Ethics

Ethics or practical philosophy should therfore be directed only to aim at the proper training of the sphere of subjective consciousness and character, *i.e.*, of the susceptibility of the will to the motives, by exercising it habitually in the way of encouraging the right emotions and desires and checking others. The adaptation of our life to the 'Universal Law' or harmony of the world, or in short, 'Nature' is the supreme good or end of our endeavours.

In the austerity of the Stoic moral theory the unit is thus placed in subjection to the whole; and every personal end or self-seeking pleasure, to the detriment of the universal harmony, is excluded. The rational nature of man, in its pristine simplicity, so long as it is not distorted by self-will or corrupted by art, faithfully reflects the universal reason (of which it is a part), and its law. The external goods,—health, wealth, etc.,—are indifferent to virtue or happiness; for they may be used rationally or irrationally, and may result in joy or grief. They may at most, have some value, and may be acceptab
as helps to virtue, *i.e.*, to a life in accord

with Nature or reason, and as such preferable to sickness or poverty ; but we must, by the training of our character, acquire 'apathy' towards them. Evil, vice, or injustice is only sufferred to exist as conditions of virtue and justice ; for there is nothing in vain or without purpose in the economy of nature. The wise man is one who is perfectly attuned to Nature and its law, and his virtue, or life according to Nature, consists, therefore, in absolute judgment, control of the soul over pain, mastering of desire and lust, and justice to all without the slightest self-seeking ;—a life of the utmost simplicity without any artificial wants, distinctions or privileges, and of self-sacrifice for the general good of the family, the country, and the whole universe ; and the "pride," or complacency, arising out of this moral energy of his soul is permanent, and it is the highest bliss or happiness.

The Law and the State.

The State is an emanation from the social nature of man. The whole human race should form a single community, or universal state, with the same principles and laws according to Nature and reason ; and a variety of hostile states is an evil and a contradiction to Nature. This preaches the doctrine of cosmopolitanism. Justice is based, not on enactment, but on Nature ; and Law is identical with natural reason.[1].

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[1] Berolzheimer—Leg. Philosophies Art. 15, Sec. 2.

Epicurean ethics and legal philosophy—Social contract and utilitarianism.

Epicureanism (from Epicurus 342—270 B. C.) is the gospel of individualistic, while Stoicism is that of socialistic subjectivity. The individual and his interest are not directed to be subordinated, or sacrificed, to the common interest; for the community or State is not the outcome of a process of nature, but is a handiwork of voluntary association, enactment, and contract of individuals for their security and benefit. It avers that the individual and his security interest and pleasure, as abide through life, is the goal of all human activity; and utility is the test of good as well as right conduct and right laws. Its philosophy is atomistic; in which the whole is subordinated to the parts of which it is composed.

Scepticism a negative philosophy.

Scepticism followed in the lines of Sophism, and its polemics were mainly directed against the dogmatic realism of the Stoics based on sense—perception. It was a theory of knowledge that certainty of knowledge is impossible—not even through reason (contra-Sophism). "We can know nothing, not even this itself that we know nothing." It is the negation of all philosophy and suspension of all judgment. Everything is possible, and there is nothing by which we can decide which of two contradictory propositions is true; and this explains the diversity of opinions on all matters and subjects of discussion. T' practical outcome of this is the axior sceptical ' apathy ', that knows neither of good nor evil, and makes no distinction of life and death, and pleasure and pain.

Legal theories.

The necessary corollary of this doctrine is that there is no universal principle of right action or Justice. Only custom or tradition, according to Timon (325—235 B. C.), or might, according to Carneades (214—129 B. C.), *i.e.*, enactment, fixes the arbitrary standard of right ; and obedience to law is only a matter of expediency.

Neo Platonism

To combat the long continued scepticism of the west, Neo-Platonism introduced, into Europe, the mysticism of the East. The absolute is indeed, as held by the Sceptics, beyond the reach of mere intellect or reason ; and the futility of philosophies or dialectics, based on the understanding, in driving out scepticism and sophism from the world demonstrated it. Plotinus (205—270 A. D.) relied on direct absorption of the individual soul and reason in the absolute, by ecstatic communion (yoga), as the only means of attaining the knowledge of the reality. The knower, knowledge and the known there become united in the absolute reality, which is above the dual sphere of thought, *i.e.*, of the subject and the object. The Neo-Platonic theory of the world-system proceeded further ahead[1] than the Eleatic or Megaric ' Being ', and Plato's " ideas " and

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[1] *i.e.* in its transcendentalism.

"reason"; and asserted the emanation, without affecting the original substance, in a way suggestive of radio activity, of reason and the world of "ideas," the soul, and the world of perception, in order of sequence, from the absolute. It preached a transcendental monism, alleged to be based not on any effort of intellect, but on "Darsana", like that of the Hindu systems. It is decisive for the 'seer' himself, but useless for the sceptic who cannot rise to its height.

Its influence and that of Christian Theology on Jurisprudence.

Chronologically, Neo Platonism appeared as a philosophical system after the highest development of Roman Jurisprudence under the classical jurists had already taken place. Its influence, along with that of the Christian faith, became noticeable on the science or philosophy of law when it was in the charge of the Scholastic jurists in the middle ages.

D LEGAL PHILOSOPHY IN THE ROMAN ERA.

General characteristics.

"The Roman world is the world of the will, and, therefore, of law and politics."[1] The Romans were pre-eminently a practical race—consisting at first merely of peasants and yeomen,—without art, culture, aesthetics and imagination, but full of vigour and discipline; and had no theoretical philosophy of their own, except what they eclectically borrowed from the Greeks, after Greece had become, by conquest, a Roman province (146 B. C.). Their legal philosophy was, at first, developed unconsciously inside the Law itself, rather than in theoretical studies, and latterly, by the assimilation of the Stoic and Aristotelean tenets regarding Nature, which were more suited to Roman realism than the more abstract Greek speculations (*e.g.* of Plato) as to ' realities ' ' ideas ' or ' the theory of knowledge.'

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[1] Miraglia—Comparative Legal Philosophy, p. 5.

Principle of power and absolutism in the early Civil Law

The early ' Civil Law was rigid and severe and formal, devoid of ethical factors, and characterised by its power and authority and the absolutism of the private rights conferred by it. The absolute prerogatives and privileges of the paterfamilias or the creditor,[2] the artificial agnatic constitution of the family and law of succession, etc., evince an undeveloped ethical instinct, which ignores, in the interests of social solidarity efficiency and order, the moral claims of weakness to the consideration of Law and of exceptional circumstances to concessions in the administration of legal rules.

Introduction of the ethical element in popular consciousness and law.

The development of Roman law, from its crude beginnings, into the greatest legal system of ancient Europe was brought about by the influence of ethical ideas gradually liberalising the law for the ends of practical

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[1] cf. The Twelve Tables 449 B. C

[2] See Maine's Ancient Law Chs. V to VII, Berolzheimer—Leg. Ph., § 17.

justice. The legal system, that was originally local, and confined to a people fighting with its neighbours for its very existence, was soon to become a world—system meant for the whole civilised human race. Conquest and rule of foreign countries, and influx of or contact with foreigners, politically, as subjects, protegees, or allies, or for purposes of commerce, necessitated internal re-adjustments of the social fabric to secure its homogeneity and expansion, and humanitarian concessions in the legal and political system to make it cosmopolitan. Internal dissensions, caused by acute class—distinctions, were set at rest; the absolutism of the patriarchal power and private rights was minimised by the legal recognition of moral duties and responsibilities appropriate to the 'bonus (diligens) paterfamilias'; and last, though not the least, a great weapon of legal amelioration was forged in the "Jus Aequum" of the Praetor, for an all round liberalisation of the law. The developing legal consciousness of the nation, maturing in power, wealth, territory and wisdom, outstripped the narrow conceptions, of legal right, forms, or procedure, of the old Civil Law, and established a secondary system, on more advanced principles of material or practical justice, which was administered by the Praetor, and promulgated by his edicts.

Its philosophic formulation as Law of Nature.

These new and higher principles of justice, conceived in the legal and ethical consciousness of the people, borrowed their philosophic foundation, form, and expression from the Stoic doctrine of Nature. "The Naturalis Ratio" was the basis of Roman Equity. Roman legal philosophy, as based on the Law of Nature, *i.e.*, on the moral spirit or reason inherent in the natural order, as opposed to arbitrary human enactments, was carefully elaborated in the writings of Cicero (106—43 B. C.), its chief exponent, and also of Seneca (3 B. C.—65 A. D.), and of the 'classical jurists' who flourished later during the 'golden age.'

Rome of Christian ethics less important than that of the theory of Natural Law.

Some changes were introduced into Roman Law, during the reign of the later Emperors, under the influence of Christianity, which was adopted as the religion of the state. Christian ethics, for instance, gave additional impetu towards the amelioration of the condition of the slave, and of the son under power, and somewhat checked the excessive looseness of the marital rights and duties of the time[1]; but the philosophy of Law, on which the Roman system was mainly developed, and on which many of the legal rules and juristic theories of the Romans as well as of the modern world regarding ownership or contract were established and elaborated, was their doctrine of Law of Nature. With the Stoics, it was a mere ethical theory for the control and guidance of individual subjectivity and conduct; but, by the Romans, it was regarded as a fundamental legal principle or ideal for the regulation of the society; and their identification of it, for all practical purposes (notwithstanding the admitted differences between the two on some points, *e.g.*, regarding war, slavery etc.), with Jus Gentium[1] which consisted of concrete laws or rules commonly observed by all men or nations, helped them immensely to utilise their theoretical ideal for the practical and constructive work of legal improvement.

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[1] See Maine's Ancient Law, Chap. V.

The great service of Roman Law to modern Jurisprudence

The great legal system left by the Roman Empire had inspired many theories of modern Jurisprudence, *e.g.*, those as to the state, sovereignty, rights and their classification, contract, property, possession, crimes, testamentary and intestate succession, juristic persons, negligence and diligentia &c., and it will be out of place to discuss them in detail here; it will suffice at present to note that modern Jurisprudence would have yet remained in its infancy, if it had not been supplied with the rich mine of legal ideas left by the Romans.

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[1] As to how this identification was made, see Maine's Ancient Law Ch III. He seems, however, to labour the point more than it deserves The Law of Nature was the Law of reason immanent in all men; and Jus Gentium, being law observed by all men or nations (see Justinian's Institutes—beginning), would presumably accord with that universal reason. See Pollock—Note F on Maine's Ancient Law.

E.—LEGAL PHILOSOPHY AND THEORIES IN THE MIDDLE AGES.

General retrogression in the middle ages.

After the Barbarian conquest of the Roman Empire, the civilisation of the world underwent a serious retrogression during the middle ages (5th century to the 15th century A. D.). The first half of this period had been specially marked for its total dearth of literature, science, arts and philosophy. All ancient learning was buried under the debris of the Roman civilisation. Latin, the language of the Roman Empire (and along with it, the vast storehouse of all knowledge) was lost and forgotten. The pagan literatures of the east were tabooed. Europe was now a vast arena for warring nations and adventurers. Life and society were insecure; and the scanty culture, that still remained extant, was limited to the clergy of the Christian Church.

Domination of the Church.

It was a period of Church domination. Christianity, represented by the Catholic Church under the see of Rome, was the universal religion; and the Church, as the sole repository of the remnant culture, wielded unlimited power, temporal as well as spiritual. It claimed that, by gift of God, and the charter of the Roman Emperor, it was vested with these twofold powers, and the states derived their power and validity from the Pope, as the moon from the sun. At first, the states and rulers acknowledged this

The Scholastics.

authority; and the doctrine that secular governments were valid and binding as the necessary means of keeping peace on earth, as long as they were subservient to the Church, was preached with vigour as early as the beginning of the 5th century by St. Augustine (353—430). Conflict of opinion on this point, however, arose and became acute towards the latter part of middle ages, when poets and thinkers, like Dante (1265 -1321), William Occam (1270 1347), Marsilius (d. 1328), Nicholaus Cusanus (1401-1464) supported the independence of states of the mediacy or supremacy of the Church or the Pope; and all, except the first, even then preached the doctrine of sovereignty of the people. They, in fact, foreshadowed in their writings the more modern theories of Natural Law and Social Contract, and laid down, on that basis, the proper limitations of the sovereign's authority and power. The Church also had, indeed, its adherents still, *e.g.*, Augustinus Triumphis (1243--1328) and Peter de Andlo, and the greatest of them was Thomas Aquinas (1228 1274); but its extravagant claims had already been too much distrusted, and were soon to receive their death blow by the Reformation.

The stratification of society: the rise of the corporate industrial and commercial class.

For a proper appreciation of the legal philosophy of the middle ages, as developed by the scholastics, and also of the principal causes of its failure, it is necessary to study the existing condition of the society. Under the overshadowing Church, as the centre of culture and the spiritual head as well as the immediate source of the temporal authority, there were the feudally organised states. Between the feudal lords and large proprietors on one side, and the peasantry, dependent class, or serfs—a motley group composed of upraised slaves or lowered free-holders—directly connected with the soil, on the other, there grew up, in the latter part of the middle ages, a third or middle class, the manufacturing and commercial citizens and yeomen, who, originally regarded as belonging to the dependent or the lowest strata, latterly grew in importance with the growth of industry and commerce, and accumulation of wealth, through their legitimate pursuits, as also by freebooting expeditions in the east (following after, but still in the name of, the crusades) and the persecution and plunder of the Jews under the aegis of the Church. They further organised their crafts and trades into city guilds or corporations, to create offensive and defensive monopolies, and soon grew into a power in the community. In this, they received the encouragement of the law and of the Church, for their wealth and influence often went to the interests of the state and the clergy; but it went hard against the general unincorporated classes and individuals who formed the bulk of the people. The ordinary agriculturer was exploited, and there was no law to help him.

The economic bondage grew too terrible for the masses.

Scholastic philosophy and objective order, law or "Pax"

The scholastic philosophers, from the 11th century downwards,[1] combined Greek Philosophy (especially, the Aristotelean and Stoic) with the tenets of the Christian Church. In the early Christian era, the Church doctrine had been allied to Platonic philosophy by the Apologists and the Alexandrine Fathers, and, in the 9th century, to Neo-platonism by Scotus Erigena, for a purpose common to both, *viz*, to combat subjectivsm or scepticism, and establish the objective reality of God and the universe, the unity of the subject and object,—spirit and nature, thought and being—(as correlative emanations from the one absolute reality), and the Lex Eterna—the law of universal reason, sumna ratio, the unwritten law of Nature or God which, notwithstanding transgressions after the fall of man (due to his improper exercise of the self-seeking will to the detriment of the order and harmony of nature), was ever ethically binding on all individuals. The creed of the church was assumed to be absolutely true, but it was not made to rest on authority, revelation, or faith alone, but was supported by philosopical reason. The Scholastics were exponents of order (cf. 'Pax,' of Augustine)[2];

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[1] Cf. Petrus Lombardes (d. 1164) Anslem Archbishop of Canterbury (d. 1093).

[2] Berolzheimer Leg. Ph., § 21, page 22.

i.e., the subordination of the 'subject' to the objective law and discipline of the "state" and of "Nature", for the secular state—the 'civitas terrena'—was also a gift of God or product of nature, only lesser than the church ('the Civitas Dei.'); and of the individual to the corporate life and regulation of his guild and society. The deistic conception of Christian Divinity and the theistic "Nature" of Greek Philosophy were united with extraordinary subtlety of reasoning and imagery[1] and the "Law of Nature" was thus brought down to the modern era.

The Scholastic split: the Dominicians and the Franciscans

This extraordinary discipline and bondage of the individual will eventually brought about a split in the scholastic camp. The Dominicans, headed by Thomas Aquinus (d. 1274), were for the orthodox position, *i.e.*, the subordination, of the will to the intellect, of practice to theory; whereas the Franciscans, headed by Duns Scotus (d. 1308), supported the supremacy of the will, on which they proposed to lay the foundation of practical ethics and an unerring law and philosophy; and thus gave rise to a new tendency towards individualism, and the recognition of the relativity of law, and scepticism as regards an eternal immutable law.

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[1] See Salmond Jurisprudence, pp. 44 & 47, § 15-16.

Another split: Realism and Nominalism.

The split between subjectivity and objectivity was also accentuated by the rejuvenescence of the long standing antithesis of nominalism and realism in the realm of the intellect itself. The Nominalists, (*e.g.*, Roscellinus) denied the objective existence of 'universal' notions, but held them to be mere names or conceptual generalisations from comparison of individual objects; whereas the Realists, (cf. Anslem) like Plato, supported their objective reality. The Nominalists thus regarded the individual as the only reality, and strengthened the position of the Franciscans, and helped the overthrow of the doctrine of objective 'universal' order. They jointly represented the latest form of Scholastic thought, and a newly rising conception—that of the sovereignty of the individual, of his subjective will and understanding.

Juristic theories.

The juristic theories of the middle ages thus present a variety of conflicting views and ideas which contained the germs of all future modern speculations. The general trend was of course to uplift the law as the divine and immutable natural order ('Pax')[1], and to subordinate the individual to the secular state, and both to the Church, like the parts to the whole, as in a monistic natural organism. Any disagreement or disunion necessarily spelt an ethical wrong on the part of the rebellious individual or state. This trend, as seen above, was afterwards liberalised. The most valuable fund of juristic theories has been left us by Thomas Aquinus. He divides Law into (1) Lex Aeterna, the Law of divine reason ; (2) Lex Naturalis, which is the department or shadow of Lex Aeterna, so far as it is conceived and understood by man, in which man participates, and by which men and states distinguish good and evil (morality) ; and (3) the Positive Law enacted by the states for the regulation of individual conduct, which carries out in detail the precepts of Natural Law, so far as it is feasible having regard to human weakness, local traditions and circumstances, and security of the society, and other public needs. He distinguishes law and morality, and also law and equity in the administration of justice, in the lines of Aristotle ; and discusses the several theories of punishment—all of which are moot points in modern jurisprudence.

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[1] The secular state, and the church—both held as divinely ordained institutions—and the animal kingdom, and the physical world have each its own objective assigned order or law, *i.e.*, department of the Pax—Augustine.

F.—TRANSITION TO THE MODERN ERA.

The Renaissance : its internal causes.

The age of transition commenced with the close of the 15th century, and many causes co-operated to introduce it. The general spirit of dissatisfaction, arising out of excessive social political and ecclesiastical bondage of the individual, was one; decay of scholastic philosophy, which had so long supported the established order and religious dogma and faith, through internal schisms, was another; as also the birth of the new philosophic spirit which refused to accept the scholastic position that the tenets of the Church were all demonstrable by reason and began to dispute those that were not capable of proof (cf. Pomponatius 1462—1530 and Vanini 1586—1619). Mere dialectic or notional establishment of a dogma was no longer accepted as proof of its objective truth. Scientific empirical demonstrability of a proposition was more in demand, than mere logical non-contradiction or syllogistic deducibility in thought, as necessary for its acceptance.

Contributory circumstances and movements: The revival of letters.

The external movements which contributed towards the Renaissance were the Revival of Letters, the Reformation, and the growth of the natural sciences. Greek Philosophies, hitherto read only through their translations into doggerel Latin, came to be sought and studied by learned Greeks arrived from Constantinople in original. Great impetus towards revival of classical studies, including the Humanities, Law and Philosophy, was given by the Medicis and also by scholars like Bessarion (d. 1472) and Ficinus (d. 1499) in Italy, and Reuchlin (d. 1455), Melanchthon and Erasmus in Germany. The Humanists, in opposition to the Scholastics, introduced a fresh culture and created a new interest outside the sphere of religion and formal philosophy. The invention of printing also very much aided the dissemination of knowledge.

The Reformation: 16th century.

The rupture of thought with authority was focussed in the Reformation (introduced in Germany by Luther) which stood for the independence of individual religious conscience and subjective conviction,—the reading of the Law of Nature by the individual for himself, and not through dogmas and teachings of the Church and Schoolmen. Each must read and interpret the gospel by his own independent reason. Celibacy, poverty, asceticism, &c. were not to be taken as *per se* good, as hitherto taught and preached, but must be judged by each for himself according to circumstances. Marriage, worldly activities, wealth and enjoyment of layman were not against the the law of Nature. The individual must work out his own salvation through his direct relation with God which subsists without any uncalled for intervention of the priests.

The growth of the natural sciences.

Ancient Greek Philosophy was as backward in its knowledge of external nature as it was strong in metaphysics. The discovery of America and of the maritime route to the East Indies and the great astronomical and mathematical discoveries of Copernicus (d. 1543) Kepler

(d. 1631) and Galileo (d. 1642) and Newton (d. 1727) discredited and distroyed transmitted errors and prejudices shared alike by Plato, Aristotle, the Scholastics, and the church, opened out new vistas of knowledge, and raised expectations of infinite progress; turning enquiry from unfruitful dialectics of thought to the observation and experiment of the concrete facts of the world of experience or matter (hitherto treated in contempt as derogatory to the dignity of man), with a mind to accept correct inductions from the data so obtained as truths, fearless of any time-honoured theories authorities or prejudices to the contrary. Among the exponents of this new philosophy may be named Bacon (1551-1626), who is the foremost of them, the Italian philosophers, Cardan (1501-1575) Campanella (1568-1639) Bruno (d. 1600) and Vanini (1586-1619), and the German Bohm (1575-1624)[1].

Social and political changes and activities.

With the spirit of freedom in the air, Feudalism decayed; the Romano—German Empire went to pieces, and absolute territorial monarchies were securely established as independent units, owing no allegiance, temporal or spiritual, to the Emperor or the Pope. This gave a rude shaking to the authority of the

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[1] Though they are very much differentiated from each other by their national characteristics; for instance Bacon, is a champion of empiricism, Bruno a representative of poetic pantheism, and Bohm of theosophical mysticism.

Corpus Juris as the common law of Europe, and laid the foundation stone of the national spirit which eventually led to legal development along national lines. With the development of the scientific spirit, and interest in mundane things, and respect for their value and utility, industries, commerce and other useful pursuits, indicative of individual and corporate enterprise, grew up to replace the idle and ignorant and superstitious pleasures pursuits and adventures—of the days of knight errentry and the crusades.

Activities for civic emancipation.

Most of the feudal monarchies of the middle ages in Europe, both in and out of the ambit of the Roman Empire, especially those of France and Scotland, had, since long before the 16th century, set up absolute independent sovereignty. Some had never really acknowledged the authority of the Romano German Emperor; and those who had, now ceased to admit his suzerainty. Many of them were quite tyrannical and despotic in the exercise of their sovereign power. The Roman Law, which, since its revival in Italy from the 12th century onwards, had gradually permeated the kingdoms of Western Europe (chiefly through the efforts of the emissaries from the Italian universities and the Romanised French lawyers), hallowed the sovereign's position with its juristic stamp of absolute unlimited authority which it would be almost a heresy to doubt or deny; except, perhaps, for the purpose of demonstrating its subordination to, or limitation by, the authority of the Roman Church. The new spirit of rebellion against authority soon extended towards civic as well as religious emancipation; and there were many among the leaders of the new movement [1] who preached the public right of active rebellion, and even of assasination, against tyrannical rulers. Bodin, while adopting the Roman juristic conception of absolute sovereignty, makes the existence of personal rights the basis of the state's power; and Althusius bases it on social contract, and the delegation, under it, of the authority of the people to the sovereign, somewhat in the lines adopted by the later schoolmen named above (see § E); but what distinguishes these new theorists from their scholastic predecessors is their use of the theory of sovereignty of the people for the practical purposes of political revolution.

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[1] *C.f.* Junius Brutus, Bodin (1530—97), and Althusius (1557—1628).

PART I.

THE

Individualistic Theories.

LECTURE II.

The Philosophical Theories of Modern Jurisprudence. (The 17th, 18th and early 19th Centuries).

Spirit of the modern age—emancipation individualism or subjectivism.

The spirit which dominated the modern era (beginning with the 17th century), its civilisation and thought, was that of emancipation;—religious emancipation from the yoke of the See of Rome, civic emancipation from the tyranny of despotic secular kings, and emancipation of thought from the bondage of traditional opinions, dogmas and prejudices, and of all written texts (whether cited from the Bible, Aristotle, Cicero, or the Corpus Juris). It may also be described as one of individualism, *i.e.*, of the individual's liberty of body and mind or thought against political and religious or philosophical tyranny; or of subjectivism, which, though born of doubt, was not destructive or despondent, as mainly characterised the position of the ancient Sophists and Sceptics, but constructive and full of hope, which seeks, by independent individual observation and study of the facts of external nature and of the processes of human thought, to raise new theories of science, philosophy, ethics, law and politics, which would be free from preconceived or transmitted notions and prejudices.

With regard to this process of emancipation, I would simply quote Dr. Berolzheimer's remarks [1] that "Intellectually and spiritually the process of emancipation began with the Reformation; the French Revolution, proclaiming the rights of man, developed it formally; and its economic and social consummation was reserved for the social-ethical movement at the close of the nineteenth century."

Two lines of thought in the horizon from the outset—idealism and empiricism naturalism or realism.

But, from the outset, this newly emancipated intellect of the 17th century was directed, in its search after knowledge, into two different channels. Both Bacon (1561—1626 A. D.) and Descartes (1596—1626 A. D.), eager and earnest for certainty and truth, equally opposed the acceptance of time honoured prejudices and dogmas, and favoured the elimination of all ideas or data except those received from direct, accurate, and unbiassed observation of nature, in the investigation of truth; but while Bacon, true to his English characteristics, enthroned, as the 'Novum Organon',[2] Experience or Perception, and proposed to rely principally upon the facts of external nature, as gathered by the outward senses, as the primary materials for his induction, Descartes, with his national idealistic tendencies, regarded the senses as unreliable, and turned to the mind and its thought (cogito, ergo sum), as the primal indubitable basis of all true knowledge.

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[1] Legal Philosophies, p. 113.

[2] As opposed to Aristotle, who, in his 'Organon' made it more his business to teach how logical correctness of conclusions from given premises might be secured, rather than the proper mode of testing the premises and conclusions with reference to the facts of actual experience.

Subjectivism.

"THE principle of subjectivity," says Prof. Miraglia,[1] "is the foundation of modern philosophy, whose motive is either thought" (idealism) "or experience" (materialism or realism). "Experience is resolved into external sensations, into pleasures and pains, into the utilities of man, conceived as an individual. In experience, the subject prevails, as sense or tendency to pleasure, aided by hedonistic calculations" (as in England). I may supplement this by adding that, in thought, the subject prevails, as reason or tendency to be free from all outward influences, including utility and pleasure, and aims at abstract liberty, as individual human nature seeking free expression, in perfect equality and freternity (as in France), or in perfection, including culture, *i.e.*, the maximum development of the inner powers and faculties, and supremacy and control over the external natural agencies (as in Germany).

Descartes.

"I think, *i.e.*, am conscious of myself, hence I exist (cogito, ergo, sum)": this is Descartes' first postulate of knowledge in philosophy. This idea of self-existence is innate in man, *i.e.*, is not voluntarily created by imagination, nor borrowed, like perception, from the senses ; and hence, it represents a truth or reality. Descartes, the founder of modern idealistic philosophy, thus starts with the innate ideas, and the proper deductions from them, as the most reliable sources of knowledge of truth. Our idea of God, the infinite perfect being, is similarly innate ; and there must be a God from whom this idea has arisen, and of whom it is the unimpeachable proof. The spirit, mind, soul, the self (ego) or the subject is characterised by thought ; and matter, body or the object by extension. Though essentially different and exclusive of each other, they are both connected together, and made to act and interact with each other, by the force of God. God is perfection and truth ; and hence, clear cognition or perception, which is the result of the interaction of the subject and object, and the outcome of the force of God, is also, therefore, a reliable instrument for the finding of truth.

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[1] Comparative Legal Philosophy, p. 21.

Idealistic philosophy and jurisprudence.

The dualism of subject and object—of spirit and matter, the sharp contrast between the two, their *primâ facie* irreconciliable characteristics of thought and extension, which (since the liberation of the subject from the thraldom of the objective world in the shape of political discipline and religious and philosophical dogmatism, and the assertion of its position as a co-ordinate entity with the object, and of its right to think out, independently, its constitution, place, and end in the economy of the world) attracted special attention in the era following after the middle ages, led to the consideration of the question as to how these opposite principles or substances are made to interact or affect each other ; or in other words, how does the mind perceive things, and, by its will, influence the body, and, through it, the external sorroundings. German philosophy took up the question in right earnest, and, since Descartes, there was accordingly a decided turn of this philosophy towards epistemology or theory of knowledge. English philosophers, as remarked before, assumed a superficial solution of the question, took it for granted without seek ing a philosophical explanation, and directed themselves to what they supposed to be the more practically fruitful questions of external nature and its laws, politics, and analytical jurisprudence, studied on the basis of experience and guided by individualistic utilitarianism. Following after Bacon, they, led by Hobbes, Locke and others, founded the English system of empirical, materialistic, or realistic philosophy and jurisprudence, which will be discussed in a later lecture. For the present, we confine ourselves to the path marked out by the German school of philosophy, which developed along idealistic lines, and, through tentative hypotheses, somewhat dogmatic in character, of

Descartes, Geulinx, Malebranche, Spinoza, Leibnitz and others, step by step reached the maturer stages of philosophic criticism, in Kant. The connection, between the developments of continental philosophy and continental jurisprudence or legal philosophy, is so intimate, that I am constrained to discuss the main features of the former at some length, so that you may fully appreciate the nature and progress of continental jurisprudence from Grotius onwards. Kant was a land mark in both philosophy and jurisprudence; and the advance, from Grotius to Kant, in legal philosophy can be best followed, if we understand that from Descartes to Kant in philosophy.

Developing idealism in philosophy.

Descartes emphasised the dualism of the subject and the object, regarded both as substances, and established their connection through the force of God. It was the dogmatic assumption of a *vis major* to conjoin two absolutely inconsistent and irreconciliable substances, viz., mind and matter. Geulinx explained the operation of this *vis major*; and supposed it to intervene, on each occasion that we perceive or exercise our will, to assist the correlation of the two, according as the subject or the object is the passive agent. Malebranche (1638—1715) took up the problem, in France, and reached a more developed assumption that material objects are emanations of God, as much as the mind or ego. The inter-action of the two takes place through and in this absolute divine essence wherein they are one. This obviates the necessity of a *vis major* or miracle at every step of life, in every perception and act. Spinoza (1632—1677) bridged over the difficulty of dualism by realistic panthiesm. He regards God as the only one substance, *i.e.*, self-determined reality; while mind and matter, thought and extension, are not (derivative and created) substances, as Descartes assumed, but only the two, out of the infinite, attributes, determined by the substance of God, *i.e.*, forms, in which the single substance reveals itself to us. These attributes are never isolated or apart; but are everywhere together, correlated and identified as things and ideas, as body and soul, *i.e.*, as being or existence, and its reflection, in thought. The two are the same in substance; but only expressed, in the one case, as consciousness or thought, and in the other, as material extension. The individual ideas and material objects are *accidents* or modes in which the infinite substance expresses itself, *i.e*, its attributes. They are the various evanes̀cent individual finite forms, perpetually appearing and dying away, without any proper reality of their own, and related to the substance like the waves to the sea. He denies free will in man, which is only a natural force with the illusion of freedom. Spinoza is the exponent of strength and activity, as partaking of spirit or *the idea*, and as the source of right.

According to him, inadequacy, weakness or passivity is the result of want of knowledge, confusion, and subjection to the passions. Highest power commands the highest right; c.f. the state, in which, by agreement, the bulk[1] of the power of the community is vested, for checking the acute struggle of individuals through conflicting passions and interests.

Leibnitz (1646—1716).

Descartes left the dualism of mind and matter unsolved, except by the assumption of a *vis major*. Spinoza sought to assimilate them as correlative attributes of God; while Leibnitz, more idealistically, reduced matter to spirit, as "confused ideation,"—as an unconscious spiritual atom, having, in it, the potentiality of development into a conscious and thinking monad. Liebnitz, somewhat, anticipated by Bruno in this direction, is a spiritual atomist; for, according to him, the world is composed of a plurality of monads, or spiritual force-units, or souls, which are indestructible and insusceptible of external influence. Each of them, while qualitatively different, is a microcosm, capable, each in its own way, of unfolding its inner nature into the fully developed spiritual elements of consciousness and knowledge of the entire universe. Bodies are aggregates of monads, like fish ponds full of living fishes. Dead matter is made up of monads in a state of swoon, expressing themselves only in motion; the ideas not attaining to consciousness yet. In organic nature, the thought in the monads expresses itself, either, only in formative vitality, not yet reaching consciousness, as in plants; or, in sensation and memory, as in lower animals; or, lastly, in consciousness and knowledge, as in man. All monads act in concert, and develop in parallel lines, and have parallel or corresponding perceptions and thoughts, under a pre-established harmony, *i.e.*, as variety in unity established by God, which is the unity of the universe and its final end. The operations of the soul (which is the central monad in the body or congeries of less advanced monads), as also of the different souls with reference to each other, though they are all independent and self-determined entities, are solved and smoothed by this pre established harmony. Leibnitz is accordingly a supporter of innate ideas, and goes even beyond Descartes in thinking that all ideas, including perceptions, are evolved from within the monad;—the very opposite of the empiricism, *e.g.*, of Locke and others. The mind in the monad is not a *tabula rasa*, as held by Locke, but a containing energy (cf. Spinoza); containing the principles of identity (causality), which governs the external, and finality (reason or teleology), which governs the inner nature of the universe. Spinoza's philosophy logically reduces all to causality, leaving no room for free will, reason, or teleology. Liebnitz, attaching substantiality to the monad, allows a scope for free will, or the spontaneous expression of its inherent reason.

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[1] But not the whole—per *contra* Hobbes.

Juristic theory of Natural Law: Grotius

It is now time for us to turn to our proper subject—the modern theories of Jurisprudence. The philosophy of law, *i.e.*, of Positive Law, has received special attention only in the modern era; and the first and foremost name, in connection with its birth and infancy in that era, is that of Hugo Grotius (1583—1645). He has been called the Descartes of legal philosophy.[2] His position, when analysed, is made up of the two attitudes; one, characteristic of the Renaissance, and the other, of the idealistic turn taken by it in the Continent. Firstly, he does not take for granted States, Governments, and Law, as institutions ordained by God, but seeks a rational solution or explanation under which their control of the individual, and the right extent and manner of that control, might be justified and fixed. Secondly, he seeks for this explanation and ascertainment of the constitution and powers of state, by the study, not of the outward objective facts and institutions of the world, but of the inner social and reasonable nature of the human ego. "The individual," as Prof. Miraglia says, "absorbed by the

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Berolzheimer, p. 115

community, reasserts himself, opposes it, and believes he is its origin and end; imagining even that he has lived without it (*i.e.*, in a hypothetical state of nature). At this point the ethico-juristic system begins, which is called the theory of Natural Law; for it is founded on the reason and experience of man more as an individual than as a society."[1] The Scholastic Law of Nature was something derived from God's mandate; and it attempted to be reconciled with reason with the help of Greek philosophy. In so far as the later Scholastics and Jesuit theologians sought to found states on the consent of the people, it was for the purpose of minimising the secular state in comparison with the church which was founded directly upon God's word, sovereignity and rule.[2] Those jurists, who, on the other hand, favoured the absolutism of temporal states, and stood for might as right, had Roman Law, then venerated as "written reason", to support them. Grotius freed himself from the superstitions of both camps; and his Law of Nature was a doctrine of individual rights against the encroachment of all arbitrary authority. It is a body of the principles of right action, in accordance with the rational nature of man; principles which are immutable, and would exist even if there were no God; and which include, in its broadest sense, the principles of ethics.

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[1] Comparative legal philosophy, p. 21.

Grotius, however, bases his theory of Law of Nature more on the "inner social nature" than on "reason and experience" of man

[2] Miraglia, p. 22

Grotius' leg theories.

Before formation of the states and the rule of Positive Law, man was in the state of nature and governed by Natural Law; for, as Sir H. S. Maine explains in his Ancient Law,[1] Nature abhors a vacuum, and there cannot be absolute lawlessness anywhere in the world. The social nature of man[2] prompted him to live a communal life; and there was, at the beginning, communal property. Prompted by this nature, *i.e.*, under the dictate of the Law of Nature, men grouped in society respected and abided by the free agreements *i.e.*, contracts of each other, and this agreement and contract became the basis of the division of communal, and the creation of individual property. For similar reasons, *i.e.*, under the Law of Nature, men respected the wishes of each member with regard to the posthumous devolution and disposition of his property, and when no such wish was expressed, a scheme was adopted, representing the most likely wishes of the individual, if he had been given opportunity and means of expressing them at his death; and this became the Law of intestate succession. It is, again, by a similar, but more comprehensive, tacit or express mutual agreement or contract, that the people, as a whole, in the state of nature, organised themselves into the State, conferring power upon one or several individuals to rule the rest, who promised obedience to the rule. The object of this organisation effected by the free agreement of the individuals was common utility, *i.e.*, security and stability of individual rights; and the form of Government depended on the mode in which the delegated authority was, by the popular agreement, vested or distributed. The right to rule, so conferred on the sovreign, includes the right to make positive laws, and to punish their disobedience; so that the state's or sovereign's right to punish the criminal arises out of the latter's own consent.

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[1] See Chap. IV.

[2] See Aristotle, *ante*

Theory of International Law.

Grotius' book "*De Jure Belli ac Pacis*" utilised his doctrine of Natural Law to lay down the foundation of modern International Law. The source of the Law of Nations is not positive legislation but Natural Law. His argument rests on the hypothesis that independent states are *inter se* units not governed by any human artificial organisation with a common superior; that there being no positive Law to govern their relations, the Law of Nature must govern them; and that the Law of Nature was, in fact, recognised by the Roman jurists as governing international concerns is proved by their regarding it as identical with

Jus Gentium.[1] Grotius proposes, no doubt, to derive the rules of International Law by deducing principles which accord with the reasonable nature of man ; but, in fact, he borrows them from the Roman Law of property (as it stood after the Civil Law had been fully liberalised by the principles of Law of Nature and Equity) in the time of the classical jurists. The rules, for instance, regarding ownership and acquisition of property, such as "occupatio," "accessio," "traditio," &c. in times of peace, and the rules of *Jus Gentium* regarding capture in war, were freely mixed up or confused, and incorporated from the Roman Law to form the nucleus of the new science, and the applicability of the Law of Nature to the belligerents (*e.g.*, of the rule of occupatio in connexion with the captor's claim to the spoils or booty of war), was further supported by the supposition that the disorganisation, due to war, remits the warring communities to the state of nature, with consequent suspension of civil rights.[2]

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[1] See Maine's Ancient Law Chap. V. Maine criticises Grotius' use of the term Jus Gentium in the sense International Law as involving a misunderstanding of the real meaning of the term which was, in his time, of ambiguous import.

[2] Maine criticises this application of the doctrine of occupatio, which was really meant for small things, for the purposes of International Law, especially, to large territories, as also the argument, based on the Law of Nature, by which the modern theorists of International Law, following Grotius, seek to support the claim of the private individual to the booty seized by him, as unhistorical and fallacious. He admits however, that they, inspite of their logical fallacy and historical

This theory of International Law has gracefully placed all states, great or small, rich or poor, on a footing of equality, for international purposes, on the principle, that, under the Law of Nature, all individuals or units (here the states) are equal.'[1]

Justice and Law.

Justice and Law, in their broadest sense, stand for what is ethically just and right, being in consonance with the reasonable social nature of man, or, in other words, with the Law of Nature. Hence, injustice and wrong, as their negatives, constitute, in each case, a departure from the social harmony of life,—a deviation from the normal acts and concessions demanded by reason to preserve that harmony. The social nature of man is at the root of all Justice and Law; it is the *appetitis socialis* of the individual, by which he feels the need of a life spent *tranquilly* and *as a reasonable being*, in community with his fellowmen, for the welfare of others,[2] and not for mere utility divorced from ethical motives. *Jus* is either natural, *i.e.*, prompted from inside by nature; or voluntary, *i.e.*, positive or imposed from

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inaccurancy, to a great extent humanised the rigour and ferocity of war. Grotius, it must be remmembered, wrote his book while the thirty years' war was in progress and he himself avows (see prologomena art. 28) that the horrors of the war, and its utter lawlessness led him to write the book. See Maine's Ancient Law, Ch. IV.

[1] *Ibid.*, Ch. IV.

[2] See 'Hugo Grotius' in the "celebrated jurists of the world," Vol. II, legal History series, p. 180.

without, by God (divine), or man (human). It is said that Grotius' treatise on peace and war gave a death-blow to the machiavellian policy of "des Lugs and Trugs," and rendered possible the peace of Westphalia, and the commencement, after it, of the new era of reform and equality [1].

ubsequent egal philosophy developed rom Grotius.

The legal and political theories of Grotius continued for long to be the ground work on which legal philosophers of Germany, England and France proceeded to develop their special conceptions of Nature and State and of their laws, all of which were really those left by Grotius, with modifications. We shall, for the present, cofine ourselves to those that followed closely in the wake of Grotius, along rationalistic lines. They all admitted that there was a Law of Nature, as described by Grotius, and a state of nature previous to the formation of organised states; but differred, as to the characteristics of the state of nature and its laws, as to the mode of deducing those laws, and the motives which impelled individuals to the formation of states.

Spinoza as a legal philosopher.

Spinoza's contributions to legal philosophy, according to Dr. Berolzheimer, were not in keeping with his general philosophy [2]. For, in applying his pantheistic philosophy to the problems of Politics and Jurisprudence, Spinoza, in the learned doctor's opinion, was hardly consistent with himself. His extreme pantheism would in fact destroy free will, wrong and responsiblity, and lead to absolute fatalism in every detail of life and activity. In fact, Spinoza, in his "Ethica" opposes rationalism, which preaches man's independence of his environments, and his philosophy of strength, if consistently pushed to its extreme results, would lead to the conclusion of "might is right;" for whatever the strong do, by virtue of the superior force, must be in accordance with Nature. It is here that Spinoza shuns his main position, and adopts the unphilosophical attitude of placing convention, based on utility, and the artificial state, created by it, above the natural rule and oppression of the strong. He places reason above the passions as the only sphere wherein man is free, and pleads for the stoic life of passionless reason and contemplation; but so long as that is not reached, the make-shift of an artificially organised state, to keep down turbulence and secure common welfare, is provided for, with sufficient safeguards to control and limit the authority of the state, so that it may not monopolise the whole force of the community, and, by tyrannical absolutism, belie its own object, and bring on self-destruction through rebellion or revolution [1].

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[1] *Ibid.* p. 182

[2] See above.

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[1] *N. B.*—Constructive philosophic attempts to reconcile free will and determinism &c. must however proceed on the principle of

Puffendorff.

Puffendorff (1623 1694)[1] leans more towards the sense of utility than the "social nature" of man, as the decisive factor in the formation of states. Man's inclinations are to a great extent egoistic or antisocial, and not wholly social or altruistic as Grotius seems to have thought. It is rather the common need or desire (self interest) to strengthen the position of each by organisation, and to prevent the evils of helplessness attendant upon isolated and disorganised life, that prompted the patres—familias of the different households to organise together into the state by a series of contracts stipulating and fixing the constitution, the rights and obligations of the governing and the governed &c. Like Grotius, Puffendorff confused law with morals; but while the former made Law of Nature and ethics independent of God, the latter was more theological in making them dependent on the will of God, for which he utilised the then popular Cartesian philosophy and reasoning.[2] This made Puffendorff's presentation of the Law of Nature more acceptable and intelligible to the people

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differentiation of planes. The plane of reason is the plane of free will, right, strength, and good and happiness, that of passions, and senses is the plane of passive submission of the ego to environmental influences, and here external regulation is necessary. Spinoza's inconsistency is more apparent than real. The "strength" of free will in reason is real 'might' and it is always right. The 'might' of passion is not the 'strength' of the ego, but its weakness, under the sway of the non-ego.

[1] See Korkunov—Theory of Law, p 25.

[2] His great work 'De officis hominis et civis' pub. 1673.

at large than Grotius' more abstract (and apparently godless) theory; and, in the form as modified by him, the doctrne of Natural Law was the popular doctrine of the 17th and 18th centuries.

Controversies over Grotius' doctrine.

The controversies in these days on Grotius' doctrine of Nature were many sided. Should Law of Nature be based on *reason* or human nature, instead of on God, his mandate and revelation? Should it be based on the unaided and independent contemplation or analysis of the dictates of 'nature' in the human heart yielding uncertain and even conflicting results (as indicated by differences of views and opinions of the different philosophers of the school of Law of Nature)? Should we not rather accept the interpretation of Law of Nature and Reason put and developed by the greatest geniuses of ancient times and accepted by all for centuries, *i.e.*, as embodied in the Roman Law? Should we place individual opinion and sentiment in the name of equity above the sanctified principles of Roman Jurisprudence which have stood the test of time and experience? Should not law and morals be separated? The opposition to Grotius' theory came mostly from outsiders who were supporters of authority—the Christian theologians (and strangely enough, the Protestants were more virulent than the Roman Catholics) on the one side, and the Romanists, *i.e.*, the votaries of Roman Law, on the other; but some even came from persons inside the camp, *e.g.*, from those who, like Selden, made concessions to the claims of theology and revelation and of Roman Law.

Law and morals Thomasius.

The differentiation of law and morals was the first substantial step, after Grotius, in the advance or evolution of the doctrine of Law of Nature. Spinoza, while resting the position and right of the state on strength or force, had explained how only external actions (as opposed to opinions and creeds) of men were amenable to the control of force, and, therefore, of the state and its laws. Barbeyrac, though a follower of Puffendorff, also tried to differentiate law and morals scientifically; but it was Thomasius (1655-1728) who clearly limited the sphere of operation of justce and law as consisting in the external relations of man wherein it may be forcibly executed, and not in the inner disposition or thought which is beyond the reach of material force and, hence, also of the law and the state. Thomasius, like Puffendroff, bases Natural Law not on revelation, but on reason; but its contents or rules, however, are not to be elicited by analysis of human nature, but from divine decree (contra Grotius). They are, moreover, addressed, not as commands (contra Puffendorff), but as wise admonitions addressed to the heart or conscience. In proposing the formula of justice (as opposed to that of morality, which runs thus:—"Do to yourself whatever you wish others to do to themselves"), namely, "Do not to another what you would not have another do unto you," he borrowed from the Christian precepts as embodied St. Mathew VII. 2 or St. Luke VI. 31; and his formula of justice was afterwards given scientific and logical precision, by Kant, and distinguished from the opposite formula of morality, and the two together were set down as the categorical imperatives of Law and Ethics respectively, for the deduction of all legal and ethical rules. This gives to legal rules, an absolutely negative character. Moral rules determine duties towards ourselves, and may be imposed in the form of advice; while legal rules, being negative, and regarding others, call for a command involving punishment for compelling their observance. The State's power ought not to be exercised for enforcing moral duties. His (Thomasius') classification of Law (rectum) into justice, morality (honestum), and propriety (decorum) may be compared with that of his contemporary Leibnitz, namely, Law, Equity and Probity. The latter, however, bases Law not on the *will* but on the *essence* of God, as manifested in the monads, and mixes up law and ethics, and is accordingly on both points more closely allied to Grotius than to either Puffendroff or Thomasius.

Wolff (1679—1754) follows the monad philosophy of Leibnitz, though he does not admit that every monad, except the spirit monads, is a microcosm capable of reflecting the universe. So far, however, as these spirit monads, (men) are concerned, their nature aims at perfection; and so Law of Nature, found in the nature of men, imposes the duty of doing all that tend towards the perfect and the good, —the perfection and good of the individual, family, nation and the state. Wolff gave a theological turn to Leibnitz's philosophy and popularised it, as Puffendroff did with regard to Grotius'. Natural Law and its principle of perfection applies to all duties, moral or legal, towards self, others and God (a tridivision comprising Law, morals and religion similar to that of Puffendroff). These duties, imposed by Nature and her Law, create corresponding natural rights of man, which are inalienable. The state arises out of Contract in order to secure and facilitate peace, protection, and perfection, and abundance for satisfying the needs of the members—in short, for the common weal, which means a contented life without want, *i.e.*, free from all trouble, for every body. The state's duty is to provide all these; and it is necessarily clothed with all authority over individuals that is required for maintaining the discipline and paternalism without which the object of government cannot be attained.

Wolff.

Wolff's is therefore the representative German view regarding the object, authority, and functions of the state, as Locke's is the representative English and Rousseau's the representative French View.

The logical necessity of the doctrine of Law of Nature.

This doctrine of Natural Law, which was elaborated step by step from the time of Socrates downwards through the successive stages of Greek, Roman and Scholastic eras and brought into still greater prominence by Grotius and his successors along rationalistic lines, served the important purpose of offering an explanation of the essential, common and unchangeable elements, in the legal systems and the conception of law obtaining everywhere in the world, which seem to be incapable of being changed or affected by any arbitrary enactment imposed by the will of the legislator.[1] Positive laws of the societies are temporary, discrepant and variable, according to different history, needs, environments and states of progress and civilization of the different nations and countries; and this punctuates the essential distinction between man made laws and the laws of external nature like those of gravitation, motion, heat, electricity, of chemical combinations, and even those of biology and animal instincts, which are invariable and uniform throughout the world. Those who see in human-made laws nothing but the accidental and arbitrary productions of free human will rising or capable of rising superior to all external influences, easily fall in with the view that human laws and laws of external nature belong to totally distinct or even antagonistic categories; the former, characterised by freewill and teleology at their origin, and variability in their texture, and the latter, by rigid causality and uniformity, under fixed principles the operation of which no human will can thwart or modify. This, however, is but half of the truth; for there is in human laws as well, a comparatively necessary and invariable element, which is the same and common to different legal systems of many widely different societies, and which has got to be accounted for with reference to something (beyond the arbitrary dictates of the law-giver) in the constitution of man and society. No arbitrary rule of positive law can ignore these necessary elements; and experience and history establish that arbitrary rules, invented by the law-giver, or borrowed from foreign laws, and sought to be introduced into society against the grain or in violation of the existing ethical constitution of the people, have either become dead letters or led to disturbances or revolutions. The fact is that human laws are made of two parts; one, which is common, invariable and universal, depends on the natural, physical and ethical constitution of man and society and is incapable of being readily affected by the human will; and the other, artificial and conventional, and therefore variable and changing, over which the human will has a leading control. The Roman jurists noticed this fact and regarded Natural Law as part of positive law[1]: that part of it, which, being based on human nature, or the nature of *things* (which are the subjects of rights), or on the nature of the legal relations themselves, constitutes the invariable and universal part of the concrete phenomena of law and is independent of the human will. Korkunov, in his Theory of Law, Ch. III, Sec 15, has critically examined this position, and sought to prove, by citing examples, that the rules, supposed to belong to the so-called 'natural' part of Roman Law, have in some cases no connection with 'nature,' but are conventional, and are explained by the accidents of Roman history and civilization; that some others are indicative of mere physical limitations and impossibilities; and, besides, that the rules themselves are not as necessary or universal as they were supposed to be. The *Jus Gentium* of Rome, (and to some extent, the Church Laws in the scholastic days) had hitherto served to keep up the idea that Law of Nature is as concrete and real a body of rules as positive law; but the validity of this Roman conception of Natural Law is, as Korkunov

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[1] See Korkunov—Theory of Law, Ch. III, Sec 14.

The Roman view of Law of Nature.

Korkunov's criticism of the Roman idea of Law of Nature

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[1] See Justinian's Institutes —I. II. 1,

human nature consists not of social benevolence but of self-love, the instinct of self-preservation, and of self-seeking activity (Contra Grotius). In the state of nature, before the rise of human institutions of property, each man had a right to everything; and the intercollision of lives and individuals endangered life and security (the choicest of all possessions), excited fear, and retarded the free self-seeking activity of man which human nature, above all things, demands. This induced men in the natural state to form a civil contract to organise the society and transfer all their rights and powers to the civil government to form an absolute empire. Mutual fear thus led men to form the contract and the civic state as an institution for protection. The state protects society, fixes laws or rules of mutual honesty and justice, and leaves scope for the natural freedom of the individual to have free play within the limitations laid down by the Law. Such was his distrust of human nature, its egotism, envy and vanity, that it led him to advocate the absolute sovereignty of the state; for he suspected that if any remnant of authority, uncontrolled by law, is left to the people individually, it will be misused to bring back the savage natural state of man. "The state, like the Lev athan, must encompass all living things." He vetoes the right of rebellion even against a bad government, for that would bring about a worse state of affairs with regard to the peace of the society. Hobbe's contribution towards the exposition of the perfect Law of Nature is poor,[1] for his idea of human 'Nature' itself is derogatory to the dignity of manhood. Natural Law is the outcome of egoistic selflove of man restrained and controlled by reason and conscience. His doctrine is more important as the foundation-stone of the Analytical theory, with its arbitrary conception of Law, and the doctrine of the absolute sovereignty prevalent in the English school. He identifies Law of Nature with morality; and it is civic government that converts that into laws proper.[2] He in fact set up a counter current of materialistic utilitarianism (against the rationalism of Grotius), which, along with the further development of Empiricism in England, took a more defined and permanent form afterwards in Locke and Bentham, and eventually led the English theorists to give up the doctrine of Law of Nature altogether. He even considerably influenced some of the leading exponents of the rationalistic school, for examples, Puffendorff and Spinoza, the first, with regard to the estimate of the nature of man, and both, especially the latter, by his tenet of utilitarianism.[1] Hobbes powerfully expounds the cherished view of his time that the principles of the Common Law of England are embodiments of the Law of Nature, that they are perfect and more authoritative than even Statute Law.

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[1] It conssits of certain plainest moral rules "found out by reason," enjoining preservation and forbidding destruction of life, and conferring right on each individual to seek peace and defend life and liberty and to do all other acts in the exercise of natural liberty as he would allow other men to have and do as against himself. Law of Nature further enjoins man to observe contracts, and keep trust, as necessary for peace Civic government, created by contract for the purpose of compelling people by coercive force to respect each other's life and liberty and peace, is itself a product of Law of Nature, and is accordingly absolute Berolzheimer—Ch. V., Art. 27.

[2] See the article on Hobbes. in. "The Great jurists of the world.' Continental Legal History series, Vol. II.

Locke (1632-1704) more systematically develops the empirical epistemology. The mind is a "tabula rasa" containing no innate ideas, and all knowledge and thought are the results of sensations and experiences derived from the objective world; the Ego and 'substance' are not established *a priori* as real units, but are supposed to be so in thought on account of the continuity of representations, sensations and thoughts of which they serve as the convenient logical connective, link or background. In spite of all this trend, like all other early theorists (including Hobbes in England and Rousseau in France), even he could not withstand the current attitude of the world, and help accepting the state (of Nature) and the Law of Nature as established facts, and making guesses (unauthorised by the data of experience) as to their characteristics

Locke.

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[1] See above,—Puffendorff and Spinoza.

and the mode in which they gave way to the artificial human institutions of the state and Positive Law.[1] His conception of human nature and of the state of Nature was nobler than that of Hobbes, and, consequently, he is an advocate, not of absolute, but only of constitutional or restricted sovereignty of the state, leaving ampler scope for individual liberty of self-disposition. The original compact, which gave rise to the state, did not, and was not meant to, transfer all the powers of the people to the sovereign, but only a part, namely, that of punishment, legislation and administering justice, so far as it was necessary to secure individual freedom ; and even that on condition of good government, failing which, the authority, so conferred, was liable to forfeiture or revocation. There were, according to Locke, personal rights, capacities, and individual property through labour and occupation, in the state of nature ; and the contract to form the state was made only with a view to secure a guarantee against individual self-aggrandisement imperilling those personal and proprietary rights. The English traits, evincing a passion for individual liberty, property, and utility, are seen combined in this representative jurist ; and in his dispute with Sir Robert Filmer, who, Hobbes-like, advocated absolute monarchy, he stood for the real English national sentiment. His division of governmental power, into legislative and executive, was the precursor of the constitutional doctrine of three-fold division of sovereign authority elaborated by Montesquieu.

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[1] See H. S Maine—Ancient Law, Ch. V.

Hume (1711-1776) Bentham (1748-1832)

Locke's empiricism in philosophy and utilitarianism in politics and law were respectively developed and carried to their legitimate consequences by Hume and Bentham. The former (Hume) set up a thorough-going perceptionalism, positing the entire dependence of the subjective mind for all its ideas, *e.g.*, of soul, substance, or causality, upon the materials supplied by the objective world through the senses; and also scepticism regarding the realities behind them, as against the dogmatic rationalism and dualism of the Cartesians. The latter (Bentham) gave up speculations regarding the state (of Nature) and the Law of Nature, and scientifically applied the principle of individual utilitarianism to build up the theory and art of legislation, and to introduce wholesale practical reform of the English Law. In fact, after Locke and Hume, the doctrine of Law of Nature ceased to be philosophically treated and discussed in England. Blackstone (1723-1780) indeed often dilated upon it in his "Commentaries," and his popularity and influence helped for long to continue the hold of the doctrine over the popular mind; but the higher intellects in the country, imbued with the empiricism and scepticism, inaugurated

Fate of the Law of Nature in England after Locke, Hume and Bentham. Blackstone.

there in the latter part of the 17th and the 18th century, and practical common sense naturally averse to theoretical speculations, had even before the rise and growth of the Historical school, ceased to offer their homage to the doctrine.

Law of Nature in France.

Empiricism and sensationalism was now carried over to France. It even led to materialism ; but the speculations as to Law of Nature found passionate exponents in the sentimental soil of France.

The French Illumination

The growth of empiricism, scepticism and nominalism, which, as I have indicated above, progressively characterised the opposition of the English philosophy of Bacon, Hobbes, Locke, and Hume to the rationalistic dualism of Grotiŭs and Descartes, did not reach, in the soil of England, that extreme form of sensualism and materialism, which spells complete destruction of all the foundations of moral and religious life, as it did in France. A reaction was soon set up in Great Britain against the empiricism of Locke by the rise of a wave of dogmatic realism under the influence of the Scotch Philosophical School[1] who accepted certain principles of truth, innate and immanent in the subject, and the data and evidences of the senses and perception, the understanding and the moral instincts of man. as proofs of realities. The dark days of Protestant[1] England had been over; and the practical and steady English character, and the stable condition of the society readily fell in with the view of things which was suited to reconcile man and philosophy with the existing order. In Catholic France, however, the social and political condition, made up of the wholesale demoralisation of the society,[2] and the struggle of secular and ecclesiastical power, continued, as in middle ages, with similar effect, namely the debasement of the people; and bred and fostered a spirit of rebellion in philosophy and thought against all the tyranny and corruption that were then prevalent in morals, religion and the state. The destructive philosophy of sensualism and scepticism was directed with bitterness against all received opinion in psychology, law, morals, politics or religion as inconsistent with the irrefutable demands o reason. Condillac (1715—1780) and Helveteus (1715—1771) preached materialism in philosophy and egoistic hedonism (self-interest) in morals; Voltaire (1694—1778) hurled his best polemics against the positive or dictated religion of the church, and regarded the destruction of the heirarchy of intolerent priesthood as his special and cherished mission. The Encyclopedists, Diderot (1713—1784), De'Alembert, &c., preached a philosophy which reasoned out the negation of Law, Freewill and God. La Mettrie (1709—1751)) and the authors of the *systemi de la Nature* (published in London, 1770) reduced everything to matter and motion, denied the existence of mind and soul as original entities, as also freewill and immortality, and preached a rank atheism in the teeth of the catholic clergymen. All artificial institutions, social, political, and religious, being thus held up to ridicule and contempt, as theoretically unsound and practically immoral and mischievous, the atmosphere was suited to a return of the mind to the system of nature, unsophisticated by human institutions, with a passionate hope of relief; to a life according to Nature in her pristine state. The state of Nature was now an object of more fervid adoration than the Law of Nature;[1] and Positive Law was discounted as a nuisance, as a machinery for the aggrandisement of the rich and the powerful at the cost of the masses. The fundamental opposition of this emperico-sensualistic movement, begun in England and culminating in France, to the original rational or idealistic movement in Germany, consists in the former's enthronement of sense and feeling, (synthesised by association)[1] individual interest and pleasure, or utility, as the tests and motives of all truths, facts, actions and movements, in the place of reason, social benevolence, religion, or perfection on which the ethical and legal doctrines of Grotius' school were built up and developed.

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[1] For examples, Reid (1704-1796), Dugald Stewart (1753-1828), &c. culminating in Sir William Hamilton (1788—1886).

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[1] As evidenced by the social and political and religious history o England.

[2] Under the influence of a dissolute court, unrestrained despotism and high-handedness of the rulers and the nobility, the stinking hypocris and the tyranny of the clerical heirarchy under the Pope, with the tota disappearance, under its rule, of all substance and worth from the spiritual world.

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[1] See Maine's Ancient Law, Ch. V.

Rousseau, (1712-1778

The greatest exponent of Law of Nature in the 18th century in France was Rousseau. Unlike Hobbes, and even in rosier colours than Locke, Rousseau in his "Contract Social" conceived the state of Nature as one of peace equality and bliss ; wherein each individual was self-contained, requiring service or property of no one else, and contented with the fruits of his own bodily labours. In course of time, man took to occupation of land and agriculture and learnt the use of metals. This revolutionised man's lot, and brought about successive stages of the civil society and institutions, *viz* : claims of private ownership or property, inequalities in wealth, the institution of master and slave (due to demand for service and aid of others by the wealthy, for cultivation and other duties, which they themselves could not perform), and also the establishment, as a necessary accompaniment, of civil society and government, by the "Contract Social", for the purpose of securing and regulating these new conditions and institutions. Rousseau as an idealist, tired of the social political and economic evils born of the inequalities of civil institutions and self-seeking misuse of power rank and wealth, advocated in his "Discours" a return to the natural state,—"a negation of law, government, and civilization." But in his later work,—the "Contract Social"—he admits that there is no historical basis of the conceptions of the state of nature, and of the developments by which the same was supposed to have grown into the modern civil society. Here he adopts the moderate view that true liberty is not lawlessness or license, and that law and government are essential for true liberty, peace, and happiness, and proceeds to explain the philosophy and rationale of the communal bond or social order and the rights and duties created by it. This organization of the civic society, government, and law, as well as legal rights, was not brought about spontaneously by nature, for might can never make right, but by contract. The social contract determined the character of the civic bond. As opposed to his predecessors, Rousseau held, that, by the social contract, the person and activities of each individual member were left to the control and guidance of the general or common will of the community instead of his own; and the natural liberty of man was therefore not transferred (as it was inalienable) to any body outside himself, but to himself regarded, however, no longer as an isolated individual but as merged in the whole. This conception of the inalienability of natural liberty by contract,[1] and that of a corporate general body and will (as opposed to the will of a collective body of individuals constituting the rulers or government, to which, as the other contracting party, the powers are delegated by the contract), are the paramount contributions of Rousseau to politics and jurisprudence. The right of rebellion, in the event of the government (which can have only delegated executive power, the sovereignty always remaining with the people) failing to give effect to the general will, follows as a matter of course from this conception. The compact ceasing to be carried out, the individual resumes his former rights and regains his natural liberty. Government and law are justified in their giving effect to the common will and serving common interests and utility. They must direct themselves not to remove all inequalities, but to purge them of their acuteness and excesses ; and to equalise the more pronounced inequalities of fortune through preventive measures. Rousseau attached greater importance to the state of Nature than to the Law of Nature ; and his contributions to the doctrine of the law of Nature are poorer than those of Grotius and Hobbes; but, as a political preacher, his influence emphasised those of the Jesuits (in the middle ages [1]) and of Locke, who supported the right of rebellion against civil Government, on the theory of its dependence upon popular will; and egged on, by the support of juristic theory, what was brewing on religious, politicial, economic, and other grounds, and finding precedents in England and America,—the great revolution in France.

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[1] This refers to the English psychology of those days. See Bain's works.

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[1] So that the absolute sovereignty must always remain with the people.

The German illumination

I have already told you that the Cartesian dualism, with which modern philosophy made its entry into the world of thought, soon bifurcated; and side by side with, and in opposition to the empiricism, sensualism, scepticism, ,and materialism of England and France (which reduced soul and spirit to matter, and all knowledge to sensation perception and association, and tended to assimilate Natural Law to the physical laws of external Nature—both to be ascertained and gathered likewise, *i e.*, only by collecting the facts of experience), there was the counter movement of idealism in Germany, which tended to reduce all external natural phenomena to phases of thought, matter to spirit, and knowledge and experience to the progressive self-realisation of the spiritual Ego and its innate ideas developing into activity. Bishop Berkely of England was, in this respect, more closely affiliated to Leibnitz than to Locke or Hume, and was somewhat out of place in the empirical atmosphere of his native soil. The extreme subjectivity of this line of thought raised the thinking individual Ego, its interest, profit, or utility (called telelogy from the side of idealism) above all others in importance; and the result reached by the mediocrities --for examples, Basedow (1723-1790), Reimarus, Steinbart (1738—1809),—following after Leibnitz and Wolff, was indeed (somewhat similar to that of the French illumination with its materialistic trend) a general advance of eudomonistic culture; but it adumbrated a decadence of earnest regard for the depths of knowledge and truth, or the arduous attainment of individual and social perfection. The two lines of thought could not but act and react upon each other. We cannot but notice how Spinoza, Puffendorff, Leibnitz, and Wolff were all more or less affected by the utilitarianism of Hobbes; and, conversely, how the latter and his school could not avoid, inspite of their professed empirical inductivism, drawing inferences as to the state and law of Nature by deductions from unscientifically assumed or dogmatic

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[1] Note, however, that in the time of the Jesuits civil Government used to be derived, through the papal authority, from God, and Locke derives it from social contract; whereasu Rousseu emphasises the "popular" will as the ultimate source of all legal and political authority The right of rebellion is thus subscribed to by all of them, but on differen grounds.

Rationalism and Empiricism.—their action and reaction. Similarity in their practical results in spite of theoretical differences, of the German and French Illuminations.

postulates as to the elements of human nature and reason. . The differentiation and separate study of the two lines of thought may be very useful for a clear and scientific appreciation of the history of Philosophy and Jurisprudence; but it is still more important constantly to remember that no philosophy or jurisprudence can be wholly one-sided, and that, on the contrary, human understanding, by its constitution, contains both of these sides and tendencies; and what classifies the thinkers is the greater or less prominence which they attach to either of them in their researches and conclusions.

Kant ' His Critique of Pure Reason."

In his "Critique of Pure Reason" Kant (1724-1804) launched a new line of enquiry in epistemology, in which the conclusions of both the idealistic and sensualistic positions were critically sifted and examined; and, as a result, he concluded that both were vitiated by dogmatic onesidedness. He established that there is no validity in the dogmatic assumption that our fundamental ideas are inmate, independent of experience, and must, being implanted in the mind at birth by the author of our nature, correspond to absolue reality (of the Cartesians); *a fortiori*, there is no truth in the theory of natural belief, intuition or common sense[1] which proposes to rely on our instinctive belief in the evidence of the senses and

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(1) The theory of the Scotch philosophers.

understanding with regard to the material and psychic verities In fact, no two writers were agreed as to what ideas are innate in man, and what propositions are felt by the natural instinct to be true. The older empiricism of Bacon, Hobbes and Locke, on the otherhand, was equally faulty on account of the opposite dogmatism of assuming that experience (sensation and perception) can give all our knowledge of things, external and internal,—of soul, nature and God ; and that all our so called first principles of psychology and ethics—the fundamental or innate ideas (categories)—are found by generalisation and abstraction from the things given in experience. In fact, the falsity of this assumption was established by Hume, whose later phase of empiricism was not dogmatic, but critical. Hume accordingly preached scepticism—the impossibility of rising from experience to the world of realities ; but even he assumed that the knowledge of the external world, and of the process of thinking, such as we have, and for what it is worth, is derived solely from experiences knitted together by the external laws of association, and unaided by any element independently supplied by the mind. Kant, however, proved that sensation and feelings have no meanings unless interpreted by reason with some notions, forms, or laws which are independent of the external sensations themselves.

Kant's combination of innate ideas and experience.

The sensations and perceptions are common to lower animals and to man ; but knowledge of man is built up by the medley of colour, sound, smell, and other impressions, carried by the senses from the external world, put into forms, moulds, or categories of perception and of thought (*e.g.*, of space and time, and of quality, quantity, relation, and modality, etc.), to constitute a coherent and intelligent system. These forms are apriori and not contained in the sensations themselves. They are inherent in our inner nature, ready beforehand to receive and put into shape, as objects and ideas, the crude mass of chaotic objective sensations and subjective feelings and ideas caused in us by contact with external nature. Kant, nevertheless, sides with Locke and Hume in holding that these apriori elements only make the knowledge that we have possible ; but they do not and cannot lead us beyond phenomena to the realities underneath them, which, as held by Hume, remain unknown and unknowable. To account for the interaction of mind and matter, Kant, in hisfirst edition of the work,[1] threw out a conjecture that the external world of reality (thing in itself), as it stood independent of space and time, by the forms of which (lent by the mind itself) the mind transforms and interprets it into knowledge, was possibly, by itself, a thinking substance, identical with the individual ego which reads and interprets it, but he expunged it in the next edition.[2] This view, however, was afterwards built up into the system of Fichte.

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[1] 'Critique of Reason.'

Kant on the futility of reaching ultimate realities by psychology.

The human reason has a tendency to form ideas and principles by which the conditioned and varied experiences and knowledge of the understanding are sought to be extended, completed, and unified by assumptions regarding things which are really beyond the bounds of experience. The ideas of the soul and freewill, of the world as a totality, and of God (psychological, cosmological and theological) are mere speculative ideas of reason. Kant, however, takes elaborate pains to demonstrate (in his transcendental dialectics) that it is fallacious to draw conclusions as to the existence of realities corresponding to these ideas (as the older philosophy of dogmatic rationaltism had sought to do) from the mere fact that there are such tendencies and ideas in man; and that, if logically examined, they would lead us to paralogisms. In fact, we cannot go further than holding that we have an irresistible tendency to think of them as realities, for unifying, regulating, and integrating our limited and conditioned experiences and thought; and further, that they have a practical value as regards moral conviction, feeling, and conduct.

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[2] Schwegler's History of Philosophy—Kant, p. 220.

The Critique of Practical Reason.

This leads us to Kant's Critique of Practical Reason dealing with the will and its motives. Perceptions are determined only by external influence; but volitions are determined, at least to some extent, by principles and motives of reason born in the mind itself independently of external motives, and, therefore, without a cloud of phenomenal illusion barring our knowledge of realities. Hence, for the apriori elements of the mind, which, independently of external experiences, may lead to our knowledge of spiritual verities, we must look to will and volition, and the abstract subjective principles which apriori and universally move the will to form volitions. That there are such higher apriori activities of reason which in all men operate to guide the will in its movements, impelling it to rise superior to the lower activities born of the senses and the empirical feelings of pain and pleasure, is made certain by the fact of the *moral law*, universally and intuitively recognized as a categorical imperative,—as a law binding on every rational will. It is therefore a law born of, or derived from, reason: the autonomous, colourless, pure, one and universal reason, and not from animal will (swayed by the passions and external influences), or the individual self-will, which cannot dictate any eternal rule of action for all. It is this a-priori postulate of practical reason which procures certainty and truth for another idea,

—the idea of freewill. "The moral law says 'Thou canst, for thou shouldst,' and assures us thus of our own freedom ; as indeed it is in its own nature nothing but the will itself in freedom from all sensuous matter of desire, and constitutes therefore our very highest law of action."[1] Freewill is the will itself guided by autonomous reason, as opposed to Empirical will which is directed to an object in consequence of the pleasure (Cf. Spinoza) felt in it by the subject. Material motives and principles affect different men in different ways ; and being empirical, variable, and contingent, they can afford subjective rules applicable only temporarily and to particular individuals. Such rules or maxims cannot be set up as universal moral principles. Volition, indeed, must have reference to material objects, and there must be maxims of moral law to guide the will in its volition with regard to them ; but these maxims must not be derived with reference to these objects. They must be relieved of these limitations and enlarged into the form of universal laws of reason. The supreme principle of morals is consequently this :—"Act so that the maxim of your will may be capable of being regarded as a principle of universal validity—as a law universally obeyed without any contradiction resulting therefrom." It raises the will above the lower motives, reduces all wills to unanimity, and, as binding on all rational beings, demonstrates itself to be the one true law of reason.

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[1] Schwegler's History of Philosophy—Kant.

The Dialectic of Practical Reason

The dialectic of Practical Reason, raising itself under an irresistible internal impulse beyond the conditional will (and its moral volitions with their objects and laws) to reach the supreme unconditioned absolute goal or end of all activity, does not land us in hopeless paralogisms and antinomies as that of "Theoretical Reason." Theoretical reason can only feel and 'form' objects and ideas out of the sensible materials, but cannot possibly rise above the limitations of the sensible world; but the practical reason discovers its moral law in the atmosphere of the higher supersensous world of autonomous will and universal reason. The supreme unconditioned end is there discovered to be the *summum bonum*, which is at once the highest virtue and highest felicity: a union which is not possible to be reached by the operation of the material will under the influence of objective desires and motives, but only in the perfect realisation of the supreme moral law by the freewill acting solely under the dictates of reason untouched by the desires of the senses. This supreme virtue is attained by an infinite series of progress towards holiness, requiring infinite time and life (and this posits the immortality of the soul); and this supreme felicity which consists of infinite and unimpeded power to attain whatever is desired, is God. It is thus through practical reason that we are brought face to face with the realities—freewill, soul, immortality, God, and the moral law of autonomous will that perfects man into union with God.

Kant's doctrine of Law of Nature.

I have dwelt at some length on Kant's critical philosophy with a view to explain how the doctrine of Law of Nature developed, under him, a new phase, which purged it of its sensible and emotional elements, anomalies, and inconsistencies, and placed it on the abstract platform of rigorous reason. He eschewed all dogmatic and uncritical assumptions of his predecessors, *e.g.*, of social nature (Grotius), fear or self-interest (Hobbes), desire for security (Puffendorf, Locke), utility (Thomasius), the common weal (Wolff), &c., as to the fundamental basis of the Law of Nature (moral Law) ; for, as was to be expected, no true opinions were agreed on the point. Such basis must be established on the sure, fundamental, *apriori* principle of Practical Reason, which must have universal self-sufficient validity, and be independent of any interest or motives as would necessarily affect the autonomy of the will. Law of Nature must be a *formal command* : a categorical imperative on the will, deriving its obligatory character from its own free constitution founded on reason, without reference to any ulterior end ; for thus alone can it bind all men as rational beings. "The rational nature or free will of man is a purpose unto itself;" and thus, side by side with, and as corollary to the supreme moral Law indicated above, stands, with reference to our attitude to our fellow creatures, the practical imperative of the Law of Nature:—"Act so that you treat humanity, whether expressed in your own person, or in the person of another, ever as an end, never merely as a means."[1] Kant thus becomes the apostle, in modern days of freedom, of the freewill emancipated from external motives and bound only by the law of its own free rational nature.

Law and Morals.

Following Thomasius in his distinction of Law and Morals, and limiting the former to the sphere of external conduct, Law comes to be defined, in consonance with Kant's principles of universality, certainty, and freedom, as "the aggregate of the conditions under which the autonomous will of one individual may be combined with that of another under a general inclusive law of freedom"; and the cardinal mandate of law and justice running through all these conditions must therefore be this: "So conduct your affairs that the free use of your will is compatible, under a general law, with the freedom of every one else;" or in other words, "act in such a way that your liberty, accords with that of every one else."

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[1] Grund legung pp. 52, *et seq*

The State Positive Law and the Social Contract.

Now, the perfect and spontaneous realisation of the Natural Law and its corollaries—of the universal rules of external conduct imposed by the free rational will itself rising superior to the senses,—requires perfect holiness and infinite spiritual uplifting of man. The so-called lawless natural liberty of the ordinary self-seeking ego, driven by material pleasures, is not real freedom but bondage; and the organisation of the state and positive law is calculated to help men, by law-abiding association and discipline, to realise the true higher freedom in law for all. The inherent liberty is not sacrificed; only the crude lawless freedom is willingly abandoned, and is substituted by a dependence of the civic condition, which, as it is self-imposed, is no real dependence at all. There is, however, no actual contract (such as by which a company, club, or association is formed of the members for a particular object) traceable, as a fact of history, to establish the state in any society. In fact there is no consensus of opinion, but hopeless divergence of views, of those who stand for the social contract as a concrete historical fact, as to the nature, terms or objects of the contract, as also regarding the description of the preceding natural condition of man. The natural state of man is an idea, and not a fact. It is only a development of conception, an issue of understanding and reason, which reconciles man to the civic condition, and to the guidance and control of the positive law imposed by the society, and its delimitation of the wills of the individuals, for the sake of the co-ordinated liberty of the wills of all. It is this end of higher liberty in law which justifies the state and its laws (positive) and their coercion. Dr. Berolzheimer points out[1] that this is only a more philosophic articulation of the sentiments and conclusions of Rousseau. Kant, like Rousseau, formally refutes Hobbes' doctrine of *alienation* of individual rights and liberty in favour of the state, as also his theory of egoistic happiness or utility as the basis or motive of the formation of the civil contract.

Kant's state is the "Rechtstaat," which, as well as the Civil Contract are founded not on particular motives but on abstract reason;—the objective or universal necessity of the free autonomous reason and will to realise itself, by putting under self imposed law and restraint the individual natural will, to counteract the enslaving passions and the bondage of the self-seeking pleasures of life. The opposition of the State and its coercive Positive Law to Natural Law and liberty is thus philosophically removed.

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[1] Legal Philosophies, Ch. V. § 33.

The three universal conditions of civil rule according to Kant.

Kant's doctrine of the State and Law and their basis and justification in the perfected freedom of the individual yields three *apriori* principles as universal conditions of civil rule. It must recognise and uphold the freedom of every member of the community as a man and also as a citizen participating in legislation ; besides, the equality of all (*e.g.*, regarding eligibility to any office and rank to which his talents, industry, and fortune may bring him), with no sort of claim to any hereditary privilege. The Law, in the framing of which every citizen should have freedom to participate, must be supreme, and must not depend on the will of any individual person however well inclined he may be.

Theory of Punishment.

The sanction or punishment for violation of Law is (for the Law is absolute, and has no end except itself) simply retributive, and can not be measured by any extraneous principle, such as, the utility or good of the society, or benefit or correction of the culprit, or prevention of the crime.

Kant's philosophy of Law represents the culmination of the doctrine of Natural Law, ushered into the modern world by Grotius, and also its point of departure and decline. The doctrine of Law of Nature had served (as I had pointed out sometime ago) to account for the necessary elements in Law, —elements which cannot be ignored or superseded by the law—giver ; but the various attempts of the pre-Kantian legal philosophers to seek the foundation

Kant's position with regard to the doctrine of Law of Nature as a logical necessity.

of Law of Nature on something inherent in the constitution or nature of man, or on the will of God were now demonstrated to be based on shaky, unreliable, and controversial grounds. Kant, by substituting, for all these, the solid bed—rock of *apriori* reason unaffected by any external motive (happiness, utility, security, etc.), placed Law of Nature on absolutely secure footing, and logically attained for it the highest degree of necessity, universality, and certainty that its adherents had sought to claim for it. But by this, Law of Nature was shorn of all concrete human interest, and reduced to a barren and rigid formal canon of abstract logic and reason—an idle phantasm useless for the practical purposes of life.

The historial basis and necessity of the Law of Nature and Kant's position therein

Kant was, besides, preeminently an exponent of his age; *i e.*, of the historical necessities of the times. The Law of Nature of Grotius, proposed as absolute and independent of God and the Church, had also been a historical necessity; as, concurrently with the theory of the social contract which-it made obligatory on all, it supported the movement for upholding the authority and rule of the secular state against the meddlesome and excessive claims of the Catholic hierarachy and the Pope. It moreover set up an ideal regulative code, in the cause of the liberty of the individual, to curb down the arbitrary autocracy of individual monarchs and rulers and the rigour and high-handness of the

Positive Law. What, however, rendered the doctrine comparatively impotent for the amelioration of the Law and as a champion of liberty, was, first, its shaky foundation and tests regarding the nature of which there was, as we have already [1] seen, a good deal of uncertainty and controversy ; and next, its confusion, in its first stages, of Law and morals and even religion, which afforded the secular rulers a handle and loophole, in the name of morality or religion, to frame laws and regulations according to their own light, inclinations, caprice, and predilictions, and to enforce them, under the authority of the Law of Nature (as conceived by them), with regard even to the most delicate, intimate, and private concerns (tenets, religions and opinions) of individual life. "Legislation undertook to impose upon each one his residence, his costume, what he should do, and how to do it." [2] There were religious persecutions and state interferences in the most intimate manifestations of personal life, and positive Law and legislation extended itself over questions of individual conscience and disregarded the moral dignity and freedom of individual opinions and action. This constitutes the highest oppression in the name of Law, and destroys all individual initiative which is the chief agent of social progress. Kant, as we have found, sought to remove all posibility of divided opinion regarding the foundation, character and contents of the Law and rules of Nature, by denuding it of all material contents. Then again, by championing, after Thomasius, the distinction or opposition of Law and morals, and limiting the scope and sphere of the former to the domain only of *external conduct and acts towards others*, and, further more, by laying down the universal maxim of positive law by which its function was definitely enjoined never to go in the direction of curtailment of human liberty beyond what was necessary for the protection and upholding of the equal liberty of others, he reaches the culmination of the movement for individual liberty which was the avowed object of the modern doctrine of Nature in its first stage. But here also this culmination spelled its point of departure and decline. It makes Law indifferent to the question of morals. It offers to delimit spheres of free external activity of individual wills without troubling itself as to how that liberty is to be used, whether conformably to the moral requirements or not. It seeks to relieve oppression and extends liberty to the complete neglect of morals and motives of men ; and the contemplation of the extreme consequences of this position soon brought about a reaction

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[1] Widely different and even contrary views, principles and rules might be equally supported by appeal to the Law of Nature to claim recognition and obedience.

[2] Korkunov's Theory of Law p. 105, § 57, *et seq*,

Kant and the theoretical basis of social contract and law of Nature in its first phase.

It may be also pointed out in this connection that the formal[1] theory of law and liberty, which represents the highest development (reached by Kant) of the wave of individualism that had appeared under the banner of Grotius' doctrine of nature in modern Europe, as also the other intermediate (rationalistic as well as materialistic) theories[2] of Law of Nature and social contract rested on the theoretical basis of the society conceived as a mechanical aggregate; *i.e.*, as an aggregate of individuals coming together to form the social organisation, for the sake, as diversely enunciated, of the furtherance, security, protection or higher realisation of their individual comfort, happiness, perfection or liberty. The individual is not subordinated to the soceity as himself a product of social life; rather, the society itself is supposed to be a mechanical product of individual wills voluntarily creating an association. The individual, his interest, will, liberty and activities constitute, according to this theory, the sole concern and object of the law, and the state or the society is looked upon only as a machinery voluntarily created as a means to that end. This theoretical basis and conception, soon after it received its finishing and final elaboration in Kant, came also to be critically examined, along with the logical and historical

[illegible] as a [illegible]y and mechanical aggregate.

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[1] As opposed to the material or utilitarian.

[2] Examined above.

foundations discussed above, and we thus reach the 2nd stage in which the downward march of the whole doctrine of Law of Nature and social contract is soon to commence. The reaction covered all the three aspects (logical,[1] historical and theoretical). It came to be doubted if law can be properly founded with profit on a purely *apriori* and abstract basis without any material interest in the concrete affairs of life; if liberty, secured sufficiently for each without possibility of its trespassing upon the equal liberty of others, can properly be taken to be the only and sufficient goal of the society and the state, irrespective of public or private moral and other cultural interests; and, lastly, if society and social life after all has no higher significance than as a voluntary mechanical association for the furtherance of individual self seeking. This decline or reaction was precipitated by the methods of the post-Kantian philosophers: by their increasing abstruseness of form, language, and reasoning, and unconcern for the realities of life. Philosophic naturalism and realism was soon to appear when philosophic idealism was running rampant.

The Reaction.

Logical.

Theoretical.

Historical.

The historical conditions which called for the extreme Kantian enunciation of the canon of liberty were soon changed. Frederick the Great (1712-1786) preached from his throne[1] for the sovereignty of law and against the autocracy and self-seeking of rulers. The Prussian Landrecht (introduced, after his death, in 1794) was compiled at his instigation, and was inspired by the spirit of religious toleration and freedom of conscience which it specifically guaranteed. On the other hand, the French Revolution was just over; and the minds of men had full opportunity to study the opposite sides of the doctrine of liberty and of the rule of law, and to appreciate that their significance and value or merit did not consist in the abstract principle in either case, but in their material and moral objects and uses.

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[1] In its logical aspect Kant's presentation of the doctrine (from the point of view of his critical epistemology) was attacked by Hegel, who, along with Schelling, considerably aided the return to realism (which the Scotch philosophers had attempted before) of philosopy, and, along with it, of legal philosophy and jurisprudence.

The Landrecht.

The marked change from the high watermark of Kantian abstraction to the first stages of the ebbtide towards recognition of the importance, in Law, of human interests is clearly visible in Fichte's (1748-1814) practical philosophy. Kant attempted a critical examination or estimate of the two opposed trends of sensationalism and idealism appearing since Descartes' time—of the truths critically sifted out of the systems alike of Locke and Hume as also of Berkeley and Leibintz—and reached a dualistic philosophy so much richer in the

Fichte.

Dogmatic and Critical rationalism.

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[1] *Vide* his works: Anti—machiavel (1739), Considerations, Miroir des-princes (1744), Memoirs (1751), Essay on form of Government and duties of sovereigns (1777), etc.

acuteness of critical analytical insight than those of his predecessors, that the pre-Kantian philosophies have since came to be called 'dogmatic' as opposed to his own or 'critical' rationalism. Even this (Kantian criticism) however failed to satisfy the craving of human intellect to bridge over the gulf between the Ego and the Non-Ego, and to find out the unity between them as an explanation of their mutual inter-action. As after Descartes, there was again a bifurcation of philosophy, (and this time it was of the critical philosophy of Kant) into the idealistic and naturalistic channels. Fichte 'critically' proceeded on Kant's lines; but reduced the Non-Ego into the Ego. The "Thing in itself," supposed by Kant to supply materials of experience to be built up into knowledge by the *apriori* forms and catagories of the mind, is (according to Fichte) nothing but the Ego itself (not the individual Ego but the universal Ego),—the same stuff of which the individual Ego is made; for otherwise no mutual inter-action would be possible. The Ego is the only substance proving itself *apriori* as the reality in consciousness The Ego in its essence is action (will) underlying all consciousness; in its unimpeded activity it is only one, and there is no cognition. When there is obstruction to the activity, the restraint is felt in consciousness as a limitation, *i.e.*, as itself reflected or thrown back

Bifurcation of Critical philosophy.

Fichte's idealism.

into itself, and is objectivised in thought, projected from inside as it were, as the Non-Ego. The result is knowledge or cognition, in which the Ego and its limitation appear as the subject and object. The Ego divides itself into two parts as it were ; and its activity as far as it is impeded or rendered passive, appears as the object to the part which is the active knowing agent or subject. The self-consciousness of the Ego thus arises by division of the Ego (the absolute universal Ego), by self-limitation, into different individual Egoes mutually limiting, *i.e.*, operating as subject and object with reference to each other. In *action*, wherein the Ego is the active and the Non-Ego the passive agent, as also in *passion*, wherein it is the reverse, the will or Ego determines itself ; and there is no "thing-in-itself" extraneous to the Ego at all. All realities, cognitions, and individual existences are accidents of the single substance,—the universal Ego,—arising out of its self-limitation. In this theory, we have the doctrines of Spinoza, Berkeley and Leibnitz put into the mould of the critical philosophy of Kant. Fichte thus offers a philosophical explanation of Kant's position that the reality is unknowable in cognition (wherein the Ego is limited and passive, and obstructed by its divided self, the Non-Ego), but is accessible to the will or practical reason, wherein the Ego is only active, engaged in overcoming

Fichte's idealistic interpretation of Kant.

the obstruction (caused by its self-limitation as the universal Ego) of the Non-Ego and reaching its true free essence, in perfect accord with its (moral) law, which is the absolute Ego or God. In his theoretical "Grounds of Natural Law" he stands by the side of Kant in almost all respects; for he also founds Law and State on the central principle of freedom and the dignity of autonomous individual will. Civil society and legistation must be self-imposed; and their validity must depend on the free acceptence and participation of the citizens, and on the law being so formulated that "in principle, each member of society may be conceived as restricting his external freedom by the exercise of an inner freedom so that all may likewise be free." Fichte points out that the above (in which he agrees with Kant) is the necessary condition of the Law and the State—the essential assumption or presupposition on which alone the formation and continuance of the civil society can rest. But this does not explain why any one should feel it a necessity at all to curtail his external liberty, and accept the civil organisation, and, with it, the legal formula as the law of his own will and action. Even Kant had not developed this problem. Fichte supplies this omission, and, in accordance with his idealistic philosophy, asserts that it is the necessity of reason demanding its realisation in individual

Fichte's explanation of the necessity of the State and Positive Law.

self-consciousness which is only possible in an association of rational individuals; for (as in the case of the Ego's attaining self-consciousness only by the contact or opposition of itself appearing as the Non-Ego) it is by this association, or the placing of a rational individual in relationship with others, that the individual can realise himself and attain to self-consciousness as a free active agent. Like Kant, Fichte also discards the materialistic conception of the civil contract as a fact in history, designed for a definite end; but takes it only as a formal (in the Kantian sense) recognition of a truth of reason. The Law of nature is thus not a code existing antecedent to, or outside of, the state but a scientific principle expressing the essence of the absolute universal Ego (God), in accordance with which the individual egoes seek self realisation in freedom through the State and Law (Positive). These latter must be so adjusted that any arbitrary action or injustice towards any individual, in violation of the fundamental canon of freedom, would be regarded as injustice against all, and would automatically nullify the civil (contract and) organisation, so that it will itself operate as a guarantee against such lawlessness. There is no legal right except through the State and Positive Law; the only primitive right is that of the respect for the dignity and freedom of the individual. Like Kant, Fichte also

Fichte on Law of Nature and Social Contract.

No natural rights except respect for autonomy.

Law and Morals.

distinguishes Law and Morals. The distinction, however, ceases when the moral education of man, to which Law is a means, is perfected; and the restraint of law becomes unnecessary in a community of saints.

Fichte as an economist and practical statesman.

The above represents Fichte as nothing but Kant—only still more idealised and transcendental. From the above fundamental positions as to the freedom and dignity of the individual, he deduces juristic principles as logical conclusions, some of which may be noted here:—(1) The civil contract involves a contract of guarantee for the protection of the person and property of the individual; so the whole property of each individual is a pledge to secure others against his infringement of other's possessions; and (2) each man has a right to live by his labour; if he cannot earn his livelihood, the state fails in its duty, and the property contract as well as the civil contract cease to exist. He even advocates an equal division of the means of subsistence among the citizens. This practice of deducing subsidiary rules [1] from the abstract metaphysical principles came to be so much in vogue after the doctrine of Law of Nature entered its second or transcendental stage under the post-Kantian Metaphysical School of Nature, that the whole system soon came to be discredited as unreal and void of practical significance.

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[1] *i.e.*, unaided by observation of the concrete realities of social life For examples, see the works of Trendelenburg, Lorimer, Boistel &c

Departure of legal philosophy from the extreme formal position

Fichte himself, in his later works, presented a change of front from the extreme Kantian (formal) position. In his earlier work, Grundlage des Naturrechts (1796), he rigidly separated law and morals; while, in his System der Rechtslehre (1812), he sufficiently recognized their connection and correlation to appreciate the state's duty not to overlook morals altogether. His metaphysics moreover led him to depart from the rigidly individualistic position of Kant, and to see, in the 'Ego,' not the individual, but the whole human race, whose dignity, liberty and self-realisation was the goal and object of all juristic institutions and theory. We have, in both these matters, symptoms of the new movement in the Philosophy of Law, which (in somewhat varied directions) more prominently made head under his contemporaries, Schelling (1775-1854) and Hegel (1770-1831) and Herbart (1776-1841).

First symptoms of decay of the individualistic spirit.

The 2nd phase of the doctrine of Law of Nature.

The second phase of the doctrine of Law of Nature appeared when legal philosophers began to regard it not as a body of invariable eternal principles, existing from before the constitution of the State and Positive Law (by the civil contract), and present, after their institution, side by side with them as their guide and ideal (as was the view in the first stage), but as a philosophic theory to explain the basis, meaning, and inner reason of positive laws *and their evolution.* Natural Law in this stage comes to mean not "the famous code of natural and eternal laws, but the philosophical basis of positive law." The term itself now comes to be less in vogue, and substituted by the "Philosophy of Law" as more expressive of the real position. So far as this is so, the second phase marks an improvement effected in the philosophical theories under the influence of the Historical School of Legislation, that is, with regard to their proper object of study and enquiry. The concrete Positive Law was now recognised and accepted as the proper subject of the philosophy of law, instead of the speculative Law of Nature; but the deductive *apriori* method was continued in most cases, even with greater rigidity and isolation of reason from the proceses of observation and induction; and this explains why the formal and metaphysical phases of the second stage of the doctrine of Nature came into disfavour inspite of its concession to the claims of the other schools. The first stage was engrossed with abstract "Being." The second stage noticed the "Becoming," but sought to explain it only by deductions from the "Being." This was, however, regarded as insufficent and unsatisfactory. The "Becoming" had to be reckoned with as an historic entity, and its explanation had to be sought (according to the empirical schools) in its own data, *i e.*, the facts of experience and history.

Its new meaning.

Its merit and demerit

Comparison of Kantian and post-Kantian legal philosophy.

Comparison of the empirical and rationalistic schools in post-Kantian legal philosophy.

The realistic rend of philo-ophy (and lso of legal hilosophy) fter Fichte.

Fichte had saught to supplement what appeared to be defective in Kant's formalism. Kant left a chasm between the subject and the object, and also between the theoretical and the practical reason (the cognitive faculty and the will); the "things in themselves," that were, on 'critical' analysis, found to be inaccessible to the former, were intuitively regarded as homogeneous, and hence available, to the latter. Fichte removed this difficulty by regarding 'reason' or 'the Ego' as exclusively 'practical' or active, and by conceiving the "theoretical reason" as only the former in its lessened or diminished potency, due to the opposition of the object, which itself was nothing but the self-limitation of the Ego. Jacobi (1743-1819), on the other hand, opposed Kant's philosophy of criticism by his philosophy of belief. Understanding or logical intellection, which requires for the comprehension of an object, some higher or more general and antecedent principle or object, to which it may be referred as conditioning or causing its existence, must necessarily fail in comprehending what is infinite or self-subsistent. Hence Philosophy, based on the understanding, must end in fatalism and atheism. It cannot posit or explain mind or God,[1] and must proceed on the hypothesis that there is nothing but Nature. Philosophy based

Jacobi—his intuitionism.

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[1] This, according to Jacobi, is Kant's defect—and also that of every philosopher who proceeds along strict lines of log. like Hume.

on understanding alone must end in naturalism.[1] Idealistic Philosophy, which proceeds to build, uncontrolled by the fetters of dialectics (e.g., Kant in his 'Pactical Reason' and Fichte), on Reason (will), on the other hand, denies Nature and makes (reason or will) itself God. Both positions are against our intuitive belief, which accepts all the three—nature, mind, and a personal God, and the two former as designed and created by the last. Jacobi thus applies 'criticism' for the establishment of the philosophy of intuition and belief.

Herbart—his critical realism or rather idealism—idealism in theoretical and realism in practical philosophy.

We must now come to Herbart (1776-1841) the next post-Kantian luminary of the first magnitude in the first half of the 19th century, in the domain of philosophy. In the exposition of his metaphysical and individualistic realism, he sides with the empiricists in holding the facts of experience as the starting point and basis of philosophy. Experience is raised to philosophy by *scepsis*, that is, speculative doubt, as to whether our experiences correctly represent the reality, and, further, whether they have at all any reality underlying them. The notions of experiences, (*i.e.*, the categories);—for examples, time, space, motion, origination, substance, attribute, &c.,—are so full of inconsistencies and contradictions (compare the arguments of the Greek Eleatic Zeno here), that they are logically incogitable, and cannot correspond to reality unless we transform them by elimination of their contradictions; and this is the special function of Philosophy. It has to explain and reconcile the great contradictions of inherence and mutation, *i.e.*, the logical inconsistency of the problem of one in the many, the simultaneous unity and diversity of the subject and the object,—the problems of substance, causation, and the Ego. Hegel had accepted these contradictions as logical necessities of thought, and overcame them by synthesis. According to him, the real contains in itself inherent contradictions subsumed by a higher synthesis. Herbart rejects this as illogical empiricism, and posits a new set of 'reals' (not *one* but *several*), each having one particular quality, which is simple, and incapable of mutation. Each is a single, simple 'quale' with a single quality. An object of perception, in which many qualities of colour, weight, solidity, touch, heat, taste or smell appear to inhere, is thus philosophically found to be a complex of a number of 'quales' or 'monads,' corresponding to the number of qualities observed together. These reals are incapable of change; and all transformations experienced in nature are apparent or contingent, due to different reals of different qualities being placed in juxtaposition in a variety of ways, and producing, on each occasion, a different spectacular

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[1] *e.g.* that of Spinoza.

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[1] See next lecture

(that is, as appearing in experience) effect without any real change of quality. A grey colour, for example, beside black, is white, beside white, black, without any change of its quality. These reals or monads do not occupy any space; and space itself is apparent, being an intellectual expedient originating in the necessity to think the monads as well together as not together. The notions of motion and time are, similarly, only apparent, and are similarly evolved; and their logical contradiction (cf. Zeno here also) is explained in the same way as that of space. All causation, inherence, change, motion, space or time are thus explained away as phenomenal and unreal—as expedients evolved by the mind for the reading of the different modes of concatenation of the infinity of the 'reals' in nature.

His theoretical philosophy based on a mechanical conception of the reals and their relations

Coming to the Ego, Herbart's explanation of the contradiction involved in the inherence of several states, qualities, powers, functions and faculties in one individual subject follows the same line of thought. The Ego is only one monad,—the soul, which is simple and eternal. It has no varieties of powers or states or faculties; for that will be a contradiction. It is its contact, in a variety of ways, with the other reals coming into conflict with it, that calls forth its process of self-preservation (preservation of its own quality from the extrinsic disturbances caused by contact with others), and gives rise to its various states—to the apparently infinite multiplicity of sensations, ideas and affections. These are all processes of self-preservation,—representations of the monad (soul) corresponding to its relations with the other reals. All feeling, perceiving, thinking are but specific varieties in the self-preservation of the soul, representing no special conditions of the inner 'real' which is unchangeable, but only its relations with the other reals; —relations, which, pressing in at once from a variety of directions, partly neutralise, partly intensify, and partly modify each other. Consciousness in the sum of those relations borne by the soul to the other monads. A calculation is possible to be made, on the principles of mechanics, of the strength and direction of the resultant of the relations simultaneously bearing upon the soul. These relations constitute the psychological experiences of the subject. Of the ideas, some, repressed by opposition of others, hardly appear in consciousness; others, feebly appearing, are but darkly operative as feelings or desires; some others, intensified by co-operation of other relations or ideas (like hope, and other circumstances), dominate in consciousness and appear as 'will.' The character of the man results from the permanent or lasting predominence, in consciousness, of a certain mass of ideas to the weakening of others.

The theoretical philosophy of Herbart is therefore a mechanical idealism, which takes everything in the world of experience—the subjective consciousness, will, and, in fact, all internal feelings and desires as well as external objects,—to be intellectual reading and rendering, with the help of intellectual categories, of the reals and their relations, and of the statical or dynamical resultant of these relations. This spells a fatalistic theoretical philosophy, and shuts out freewill and activity of the Ego, as well as causalty, and also all purposive evolution, from the realm of reality. This, as we shall presently observe, does not fit in well with his views in the field of practical philosophy; where, like Kant, but less critically, he accepts the data of intuition and unhesitatingly builds upon it.

His practical philosophy — the State, Law, Equity & Punishment.

In the sphere, however, of practical philosophy—in law, morals, politics, art and religion, Herbart is wholly realistic, and proceeds upon the basis of intuitive aesthetic judgments (that is whether they are good or agreeable) as regards the quality of the object or relation as presented by experience, without any theoretical enquiry as to their reality; for such enquiry, for the elemination of errors or for removal of logical contradictions, is out of place in the sphere of practical philosophy, which must limit itself wholly to the world as represented by experience, in the 'forms' of the intellectual categories. The good, the ethical, the agreeable and the beautiful all depend on the instinctively certain aesthetical judgment of the Ego on the relations presented to it. There are, in the mind of the Ego, certain moral exemplars or 'ideas,' *e.g.*, of freedom, charity or benevolence, law or justice, equity, perfection, &c.; and their appeal to the human will, as such exemplars, constitutes the moral sensibility of man. The strength or weakness of this moral sensibility depends on the degree of perfection with which the moral concepts or moral ideas are developed or impressed on the mind. "Law is the harmony of the majority of wills to avoid struggle. From these five ethical concepts arise five social concepts. The concept of association or society arose from that of freedom. The concept of a system of education corresponds to that of perfection; beneficence of the administrative system comes from benevolence; the concept of juristic society (state) corresponds to law; and a system of restitution presupposes equity." Strife in a society of men offends this sensibility—strife that arises out of several men each striving for the whole or the greater part of the available objects of desire—and this necessitates a settlement of the conflict so far as it has arisen, an attempt to minimise its evil consequences, and an arrangement for prevention of future strife. Thus arises law, and the real rights (like ownership, etc). Law and rights which are necessary for the peaceful continuity of the society requires an external bond, namely, the State, characterized by its coercive power to enforce the legal duties. Similarly, unrewarded good deeds and unpunished (unatoned) evil deeds offend the moral sensibility induced by the ideal of Equity, and hence the institution of remuneration according to value (merit or demerit), that is, of reward or punishnent in Law and State. The moral sensibility judges the value (which here consists of agreeability and disagreeability) of the act, and Law and Equity, established on the authority of the State, mete out its proper remuneration. But over and above the moral sensibilities, arising out of the ideas of peace, liberty, justice and equity, there is another, namely, that of benevolence, which seeks the general good, that is, the highest possible amount of satisfaction for all, which gives rise to the administration of government for the sake of the highest good and ethical perfection of the society. Law and Ethics are thus placed together, both based on the moral sensibility of man, so that both may work together to convert a community into a spiritual community, in which all the individuals will be animated by a single spirit, or soul, without mutual strife or isolation.

Law and Ethics. The State. Government as culture—staat.

The state is compared and contrasted by Herbart with other human associations.

The State and other ssociations ompared.

Ordinary associations cannot alone establish an authority and protect themselves by it. The state has such an authority, can exercise it by coercion, and is the one sole authority over the country,—the highest association confirming all other different smaller associations in the community. These associations are established by private will, and have their institutions; but they do not possess the authority which is the third necessary element for the creation of the state.

Prof. Miraglia comments on Herbart's ethics (as based by him on the moral sensibility or intuition, of approval or disapproval of actions), as incapable of giving positive commands.[1] He further observes that Herbart's idea of Law is purely formal, *i.e.*, has reference only to its harmony with the formal moral concepts spoken of above. This accord with the moral concept is, however, the result of the value of law and cannot establish its principle.[2] Herbart, it will be observed, directed himself more closely to the actual historic forms of positive law, and sought to explain them with reference to the moral concepts and sensibilities in man. He had not grappled with the question of the evolution of social laws like his more prominent contemporaries Schelling, and Hegel; but his own disciples and followers, notably Thilo, Geyar and Ziller tried to build up a theory of Natural Law on the lines indicated by him.

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[1] Comparative legal philosophy, p. 75.

[2] *Ibid*, p. 239.

Korkunov's summary of post-Kantian legal philosophy.

With regard to the new conception of Natural Law introduced by post—Kantian legal philosophy, Prof. Korkunov observes as follows[1]:—"In opposition to the abstract systems of the rationalists who did not concern themselves with concrete reality, contemning the positive law which they considered as only a mutilation of the eternal principles of natural law, Schelling[2] elaborated his system of positive philosophy which was to explain the meaning and inner reason of all that exists. The late representatives of German philosophy followed Schelling. Among them we will cite the three who have had most influence upon modern philosophy of law: Hegel, . . . Krause, . . . and Herbart . . . None of them maintain the existence of a natural law by the side of positive law. They follow a different purpose, that of comprehending the positive law in its historic forms and explaining their basis. If they employ still sometimes the word "Natural Law," they no longer mean the famous code of natural and eternal laws but the philosophic basis for positive law. The disciples of Hegel, . . . taking for starting point the identification of laws of being with laws of thought, have struggled to present the development of different systems of positive laws as a dialectic development of a general idea, that of liberty. Krause's disciples, who form what is called the Organic school, ... think to find in the harmonious development of the individual the definitive ideal towards which the development of positive law tends. Lastly, the disciples of Herbart . . . . seek to draw all the great variety of historic forms of law from two ideas, that of right, resulting from conflict, and that of justice (remuneration), which are, according to them, the absolute base of all which we deem just and equitable."

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[1] Theory of Law, page 28.

[2] For Schelling and Hegel see next lecture.

LECTURE III.

THE MODERN THEORIES OF JURISPRUDENCE IN THE FIRST HALF OF THE 19TH CENTURY. (I)

Philosophical theories.—The Historical conception.

Medley of juristic theories in the 1st half of the 19th century.

In the first half of the 19th century, after Kant had demolished the dogmatic guess-works of his predecessors regarding the nature and origin of Law and Society, the horizon of juristic thought came to be crowded by a medley of rival schools, theories, and methods, each claiming to have found out the true scientific solution of the then all important question that troubled the legal and political world in Europe and America after the French Revolution—the question of the true adjustment of the relation of the state and the individual. It was a question which involved an enquiry into the origin, constitution and functions of the State, the limitations of its authority, and also, necessarily, into the nature of Law, its origin, sources and objects. The doctrine of Law of Nature continued to hold ground in new shapes, based on an improved system of philosophy; but the urgent necessities of constructive politics and legislation, arising out of new historical situations, advances of science, discoveries and inventions, economic problems, transformations in the social fabric; demanded, for the time, more concrete positions and readily accessible premises and logic, for the determination of the problems, than those offered by the German post-Kantian philosophers from their inaccessible heights.

Outstanding features of the society in the 19th century.

Before discussing, in classified order, the different lines of juristic thought developed after the French Revolution, it would be convenient to have a cursory examination of some of the outstanding features of the civilised world at that time.

Emancipation of the third state—the citizen class.

(1) In the matter of the constitution of the social fabric, we find, at this stage, the emancipation of the third state—an independent citizen class—with rights and liberties recognised by law. So far as Germany was concerned, the birth of this class, at least, its conception in the womb of society, may be traced to the guilds formed in the latter part of middle ages. Dr. Berolzhemer[1] describes it as having been brought about by three distinct factors:—"as the demand of revolutionary violence (cf. the French Revolution), sponsored philosophically by Rousseau in his "Discours"; "as the free concession of monarchs concerned in the welfare of their subjects, brought about by Wolff's philosophy" (cf. Frederick's 'Landrecht'); "and in compliance with the demands of justice, as theoretically formulated by Kant in his

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[1] Legal Philosophies, Ch. V, Sec. 30.

conception of the legally constituted State." You would at once notice that all these three factors owe their origin, directly or indirectly, to the dominant spirit of individualism and the doctrine of Law of Nature.

The Codes

The Codes grew up like mushrooms in the latter part of the 18th and the early part of the 19th century, to satisfy an almost universal demand of the civilised nations to have a synthesis,—a clear enunciation, as would be available to all individuals, of the law (and the whole of it), defining, proclaiming, and protecting their rights and spheres of free activity, in the place of the great confusion which had hitherto prevailed and which entailed great inequalities. They (the codes) were thus the offspring of the spirit of individualism and the craving for civic emancipation of the individual, like the Declaration of Independence (1798) and the Revolution in France, and served as charters declaring and perpetuating, with the seal of the Law, the civic independence of the individual. In Prussia (cf. the Landrecht, 1798), Austria and France, Codes were expressly demanded and declared to be based on the Law of Nature—the universal law of reason. The Roman law was, thanks to the erudition, devotion and researches of the French and Dutch jurists and publicists, then generally believed to be the "ratio scripta", or "jus naturale" realised in a concrete system; and the codes, theoretically supposed to be passed in the lines of the Law of Nature, came to be, in practice, founded on the model and materials of the Corpus Juris. We shall, however, soon find that the theory and its realisation were wide apart from each other. The civic emancipation demanded and meant in theory *for all* was actually in practice only achieved for certain classes favoured by fortune who did not fail at once to turn it to use against these lower in the rung in the social fabric.

Science of Economics

(2) Along with the civic emancipation just noticed, and partly as a cause leading to the same, we also find at this stage the birth of the new science of Economics grown out of the demands of developing commerce and industries. We have seen,[1] how, even before the dawn of the modern era and the appearance of modern jurisprudence and the philosophy of Law, Economics became a matter of importance for the consideration of the society and the state. National prosperity was, even in those days of absolute sovereignties, identified with the national exchequer and full treasury; and the primary problem in Economics was to bring prosperity and gold to the country. Accordingly, the economic science in those days (16th and 17th centuries),

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[1] See Lecture I,—"The stratification of society and the rise of the corporate industrial and commercial class"

Protectionist in the 16th century.

as represented by the Mercantile system of Colbert (1619—1683) advocated the interference of law in favour of promoting national wealth rotection,—by the favouring of trade and ie productive industries and interdiction of exportation of raw materials and precious metals. "The economic life was not conceived as that of a living organism but as a mighty reservoir to supply the public and private expenditures of the rulers—for their wars and the luxury of extravagant Courts."

The Natural Economics of the 18th century.

But in the 18th century the spirit of freedom and individualism soon asserted itself in economics as in the political and legal sciences. The Physiocrats, headed by Quesnay, (1694-1774) preached a "Natural Economics", as Spinoza had preached a "Natural Law", and demanded absolute non-interference of law in economic development in the shape of protection or trade restrictions. The "natural economics" pleaded for freedom of unrestrained competition; and "Laissez Faire" was to be the cardinal principle of legislation under which the activity of the state should be limited to the protection of the country from external attack and to the security of law within its borders. Individuals are to be left to their natural incentive to effort, production and accumulation of wealth, under free competition, in their own interests. Any extraneous attempt to give any artificial stimulus would result in failure and mischief. As opposed to the Mercantilists who favoured trade, the Physiocrats looked upon agriculture (being closest to nature) as the primary source of material wealth and wanted it to be relieved of all burdens and taxes. To leave economics to nature and its own adjustments was what they aimed at, as if human activity was similar to activities in external nature.

The Classical Economics of the 19th century.

The new economical ideas, introduced in England by Adam Smith (1723-1790) and Ricardo (1772-1823), and by J. B. Say (1767-1832) in France, transformed the science altogether. The unprecedented development, in the beginning of the eighteenth century, of the manufacturing industries and the industrial class (as sources of production of wealth), through the introduction of machinery, threw agriculture into the shade; and the science of economics had henceforth the new task of grappling with the question of capital and labour and their proper adjustment;—a question which has assumed enormous proportions as the economic influence of industry has extended with rapid strides since Adam Smith's days and has yet remained unsolved. On the point of economic freedom, and non-interference of the State and Law, in competition, by any form of preference or protection, Adam Smith's ideas tallied with those of the Phyosiocrats and were probably, like the latter, influenced by the doctrine of Natural Law. What however distinguished this new school was the importance attached by it to labour as the sole value—producing agent in economics, *i.e.*, to the principle that the average quantity and quality of labour expended for an object determines the value of economic commodities. The raw material being the same, the natural value of the manufactured article will vary with the quality and quantity of labour spent upon it. The cost of production, including the value of labour, determines the natural value of every commodity (subject of course to fluctuations arising out of disparity of supply and demand which represents the value in exchange); and the natural value of labour itself (*i.e.*, the natural wage) is, on this principle, the actual cost of production of the labour, *i e.*, the minimum cost of the necessary maintenance of the labourer and his family. If you artificially raise or lower the wage beyond or below the natural wage, the market-value of the commodity temporarily is raised or lowered beyond its natural price; but the market-value of labour or of commodities cannot be permanently kept artifically wide apart from the natural value. The wages permanently increased beyond the subsistence allowance will, as a natural consequence of plenty, increase the family of the labourer, and thus bring in more labourers into the field of competition; and by

The doctrine of labour as the source of value.

the law of supply and demand the wages will naturally come down again. Conversely, wages artificially continued to be cut down below the subsistence allowance will cause deaths, and curtail the supply of labour below the demand for it, and wages must irresistably rise again. The law of supply and demand and the law of competition are inexorable natural laws; and artificial devices to interfere with or improve upon their operation are to be deprecated as useless. Free trade and competition, freedom to individuals to accumulate wealth by lawful means, freedom of contract regarding wages and prices, and other fundamental natural rights are most conducive to the prosperity of the individual, and, necessarily, to that of the aggregate of individuals, or the society, nation, or state.

It would be interesting to note here, even at the risk of anticipating thoughts which afterwards exercised potent influence in remodelling notions of politics, economics, jurisprudence and sociology, that this classical economics was closely allied to the doctrine of freedom and individualism of the "Law of Nature" schools of Jurisprudence. In the name of individual freedom, however, it indirectly encouraged and developed class distinctions and oppression. While labour was theoretically lauded to the skies as the basis of value, as the instrument for the satisfaction of human

Reflections as to the working of this new theory of economics.

needs, and for the supply of the necessaries and conveniences of life, it helped, by its doctrine of 'natural wages', to justify the permanent creation and debasement of a proletariat—the labouring class—who would have nothing more than bare subsistence—allowance as wages. In the contest and competition of capital and labour in the new era of factories and machineries, when the capitalists owning a factory were few and the labourers were numerous, the free working of the law of supply and demand placed the labourer at a great disadvantage, and compelled him, through sheer want, to accede to any wages and terms, however low, unhealthy, disagreeable or demoralising, which his rich employer would offer to him. Economics and Jurisprudence alike preached "freedom of contract" as an abstract ideal;—but in the circumstances, so far as the labourer was concerned, such freedom was, as has been well pointed out, only "freedom to perish." The new economics of Adam Smith and Ricardo, in theory, stood up for freedom, for free trade, commerce, industry, and competition, and against economic privilege or protection of law in the interests of special industrial or trading classes; but, in practice, the very freedom which it preached, created, in those days of growing economics, inequality of capital and labour—a most oppressive privilege in favour of the capitalists and manufacturers owning factories—*viz.*, the privilege of having their own way, however shocking to the sense of justice and fairplay (and the law will not interfere as long as the labourer voluntarily submits), in reducing the cost of production to the minimum and increasing their efficiency in industrial competition with other nations and countries in the world-market. It allied itself, in theory, with the individualistic utilitarianism of English politics and jurisprudence, regarded the society, like the latter, as a mechanical aggregate of the individual members, and at least encouraged, if indeed it did not suggest, the policy of the law that allows the individual any how to seek his self-interest if only he can do so without transgressing upon the law of torts or crimes. The benefit of this policy, both of law and economics, however, was monopolised by the newly grown rich industrial class; and the favour, protection or privilege, or class distinction, openly advocated by the Mercantilists in the earlier centuries, was, in effect, indirectly, and under an illusory name and theory of justice and freedom, fostered in the 19th century by Adam Smith's school.

St Simon.

The existing conditions, however, soon came to be formally questioned and criticised by thinkers and writers. The problem that attracted the notice of social philosophers was that of the liberation of the labouring class and, particularly, of the industrial lobourers.

St. Simon (1760—1825) felt aggrieved by the inordinate value attached and excessive favour shown by the State and the Law to the royal family, the officials and the capitalists, and their undue apathy and neglect of the classes who live upon their labours and talents. He proceeded to show, by logical and historical disquisitions, that the industrial class in the largest sense of the term, including scholars, artists, cultivators, manufacturers, labouring classes and merchants, constitutes the core and mainstay of the society, and provides it with its means of subsistence and other necessaries, as well as with its luxuries and aesthetic and cultural requirements. What would happen in France, (he asked), if all these productive classes were lost to the society? and what if we lost the nobility and the capitalists instead? In the latter case the gap would be easily filled up by others; but in the former, France would lose her soul and die out. It was a matter of shame and regret that the most numerous, necessary and useful class in society should also be, under the system then existing, the poorest class, and should be reduced, due to their want of money and credit, to a position of disadvantage and subserviency to the capitalists and bankers. Society should therefore be reconstructed so that this most important section of the community (the 4th estate) may be raised up with regard to their moral, intellectual, and physical condition and freed from their economic bondage under a guarantee to give "to each according to his capacity, to each capacity according to its achievements."

The new movement

Dr. Berolzhmeir thus describes the new movement: "The object was the emancipation of the fourth estate—the liberation of the labouring class and particularly of the industrial labourer. While the emancipation of the third estate, the establishment of a free class of citizens was essentially a political movement and proceeded by overcoming the dominiance of the Catholic Church, by abolishing the feudal system and by giving all citizens a share in the government, the emancipation of the fourth estate was essentially an economic one. The issue in the former was primarily that of a political, in the latter, that of an economic enfranchisement The motive of the civil emancipation was the desire for power; the emancipation of labour, at least in its origins, grew out of the struggle for existence. The several political agitations, from the beginning of the sixteenth to the close of the eighteenth century, as likewise the uprising in the year 1848 aimed to secure a proper recognition of the citizen in the government. The purpose of the economic political movement that was inaugurated towards the close of the eighteenth century was to protect the proletariat from material and moral starvation; yet naturally this economic trend was not uniformly prominent in the several expressions of the movement "[1]

Demand for fresh theories of jurisprudence.

The situation, indicated above, demanded a fresh enquiry and study along new directions, and new methods which would lead us to more tangible and practical legal and legislative principles and policies with reference to the changing, ever shifting conditons and needs of the civilised societies of the world. The civilised world was no longer satisfied with an ideal static principle derived deductively from an abstract theory of nature which was, on account of its highly speculative character, hardly satisfactory even as a theory of the fundamental basis of law and society, and much less in so far as it proposed to point out a visionary and utopian ideal to be realised in society and law by revolutionary changes. The changes and revolutions carried out under its influence, were themselves found to bring fresh evils in their wake. What was required was a logical explanation of the developments in social structure, economics, science, commerce and inventions, and practical hints regarding the legal ethical and political standard, based on sound knowledge, as would work well, peacefully and without sudden and spasmodic changes and revolutions, for the practical control and regulation of the new aspirations and movements, that were called up by the developments in science and art.

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[1] Leg. Philosophies, Ch. VI, p. 261.

The higher intellects of the civilised world now turned to History and the Historic conception for theoretical enlightenment and practical guidance. Even here we find a branching out of thought in the philosophical and empirical directions, but the two kept touch with each other, and they may be regarded as complementary phases of a line of enquiry and thought which, while it had its root imbedded in the distant past, now rose into prominence after the high tide of rising nationalism and speculation had spent itself in the overstrained abstractions of Kant and his Formal school in the vain search after "ultimate realities." For the present we shall confine our study to the latter, *i.e.* to the juristic theories of what is known as the German Historical School.

History and the Historic conception.

Its gradual growth

Positive law, it was now apprehended, was to be studied and understood not with refernce to any lofty, abstract, eternal, speculative and unchanging reality or principle serving alike as its foundation in the past, its support in the present, and ultimate goal in the future, but with reference to its concrete historic forms for an explanation of their basis and growth. Historical research, especially in the direction of Roman Law, had already been undertaken on an extensive scale by the French jurists with Cujas at their head in the 16th century.

In the 16th century-Cujas

The old juridical Roman Life was sought to be reconstituted from the archives of history and law. In the 17th and 18th centuries this spirit of research was extended to other countries as well, notably Italy and Germany, and we have the three great names of Vico (1668—1744), Montesquieu (1689—1755) and Herder (d. 1803) from Italy, France, and Germany, who helped in evolving the historic conception or the philosophy of history as applied to the development of Law. Vico sought the philosophy of "Becoming" and of "Being,"[1] the immanent principle or reason in cosmic reality and history which develops step by step, first in inanimate nature, next in lower animals, and, lastly, in human reason. Man's thought, which, Descartes, by his celebrated dictum (*cogito ergo sum*) put forward as the certain basis of knowledge, is but a product of a long course of historic development, and can not explain itself; nor can it disclose, by itself, the inner reality or truth about the Ego, the world or God. For the "reality" or truth we must go beyond what we, for the time being, feel as certain ; because the "certain" is but part of the cosmic reality or truth—only a phase which the latter attains in course of the historic development of the world. Positive Law represents what is certain or actual, for the time being, in a given society, and based on authority, and is commensurate

In the 17th and 18th centuries

Vico

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[1] Or rather of "Being" as it is realised in the 'Becoming'"

with man's knowledge, will and power, as developed at the time, directed towards the attainment and equal distribution of what is then regarded as useful. Utility is thus the occasion and not the cause of the Law. Positive Law is always in a stage of transition, and the best form of it is that which is not strict, iron clad or cramped, but is easily amenable to development. The cause of the Law lies buried in reality, the principle or reason which has to be reached by examining the "certain" series of positive laws, in the shape of custom and legislation, through which mankind has passed in the course of history; for it is through the 'certain' that the reality or truth has to be attained. For the Philosophy of Law, we must go back to and begin from the earliest phases, with the very beginnings of nations, and not, like Grotius and his school, from the middle, after nations had been formed and were on the verge of civilisation. Vico thus shuns not only "Natural Law" which is law without history and immutable, and, besides, based on speculative ideas (regarded as certain) and innate traits of human nature or reason only at a particular stage of human history, *viz.* when man had already become civilised and philosophic, but also the view[1] which, content only to notice the variations of of positive law without searching for any explanation, regards it as nothing but a relative entity.

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[1] *e.g.* The English theory that makes it dependant on the will of the legislator.

Montesquieu.

Montesquieu was honoured by Sir Henry Sumner Maine[1] as the first jurist who, in his "*Esprit des Lois*", published in 1748 prior to the French Revolution, had recoiled from the assumptions made, without scrutiny in his time, on 'Law of Nature', and proceeded on the Historic method "before which the Law of Nature never maintained its footing for an instant." The book became very popular for its political significance—for the division, which it advocated, in the cause of the liberty of the people, of the persons of the state into departments so that they may act as mutual checks and restraints against Governmental tyranny. But as an exponent of the historical conception, his position is far below that of Vico. His work makes a monumental display of research into the institutions and laws of all grades and kinds of human society in almost every part of the world; and the avowed object is to found "the spirit of the law" on the certain observed and historial facts instead of on mere speculation. In the language of Vico, this amounts to an attempt to find the "true" immanent in a variety of phases of "the certain." As a theorist of Law, however, Montesquieu's conclusions are barren ; for he does not go beyond the suggestion " that laws are the creations of climate, local situation, accident or imposture." He overestimates the force of the accidental and external causes in the shaping of the law, and underestimates the stable and inherited qualities of human nature or the race which go to form and develop the law, at least by far the greater part of it, along certain and definite lines inspite of these changing outward influences. Comte noticed Montesquieu's lack of a true conception of progress, and pointed out that, in some instances, history shows variations while climate remain unifrom and *vice versa.* Sir Henry Maine also remarks[1] :—" Many of the anomalies which he parades have since been shown to rest on false report or erroneous construction and of those which remain, not a few prove the permanence rather than the variableness of man's nature, since they are relics of older stages of the race which have obstinately defied the influences that have elsewhere had effect. The truth is that the stable part of our mental moral and physical constitution is the largest part of it and the resistance it opposes to change is such that, though the variations of human society in a portion of the world are plain enough, they are neither so rapid nor so extensive that their amount, character and general direction can not be ascertained. An approximation to truth may be all that is attainable with our present knowledge, but there is no reason for thinking that it is so remote or (what is the same thing) that it requires so much future correction as to be entirely useless and uninstructive." Montesquieu undoubtedly demonstrated the relativity of law and held that law should answer the needs of each country and age; but he did not attain any unity or philosophy underlying this relativity.

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[1] See as to the value of the Historical School and especially its method—Leonhard—the Historical School of Law, 7 Col. L. Review, pp. 573, 577.

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[1] Ancient Law, P. 116.

The Historic conception in Germany.

In Germany the historic conception was taken up and developed in the latter part of the 18th century by Herder, and his chief prose work "Ideas on the Philosophy of the History of the human race" heralded the advent, in the 19th century, of the celebrated German Historical school represented by Hugo (1798-1844), Savigny (1779-1860) and Puchta (1798-1846)[1]

Herder

Schelling and the Historical school-comparison.

Schelling had indeed, from the philosophical stand point, already conceived the historical idea and its application to law, and in fact inspired much of the views and lines of thought of this school; but the latter chose to proceed empirically and inductively from facts of history to principles. This school recognised, like the school of Natural Law, that law is in part necessary and independent of human will; but, unlike the latter, sought for an explanation of the same from the regularity of law's developments as observed in the historic evolution of the actual legal systems, without recourse to any speculative *apriori* hypothesis. Metaphysical deductions, said Hugo, are pertinent only on their formal side; the content must be derived from experience and history.

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[1] Lahrbuch pub. 1809.

Hugo

Gustave Hugo assailed the opinion then current that law is simply a result of legislation. Law in fact is formed in all states, in its earliest stages, independently of legislation; and nothing can be more conclusive on this point than the evidence of the history of the two most comprehensive and advanced legal systems of the world *viz.*, those of Rome and England. The Common (customary) Law of England and the Equity Law of both England and Rome were formed and developed independently of legislation. The sciences articulating the systematised knowledge and civilisation of a people constitute a part of the language of the people; and this is especially true of those sciences, which, like the positive law, are conected with, and have a direct bearing on the special manners and customs of the people (which vary with the special national genius of each people). Now, the language of a people as well as its manners and customs had formed themselves naturally, without enactments or commands of any divine or human legislator, or contract of the members universally agreeing to abide by

His theory of the origin of Law.

a common set of words or mode of special conduct definitely selected for the purpose ; and this is the same with law. The Positive Law of a people also, like its language and manners, forms and developes itself as suited to the circumstances and courses of conduct happening or obtaining in the life's history of the people—in the natural course of the unfolding, development or self-realisation of the national spirit or genius.

The essence of law is its acceptance regulation and observance by the people.

Hugo pointed out that the essence or most important factor that goes to constitute the legal order in a society is its general observance by the bulk of the community—its harmony with the permanent sentiment and practice of the people. Enacted laws which arbitrarily introduce a new order in society not attuned to the national spirit are often disobeyed by even well disposed law abiding citizens ; so that, if the object of positive written law is to make the law more exact and its observance more certain, the rule enacted by the Government in contravention of the popular spirit and custom, and hardly observed or executed in society, cannot properly be regarded as part of the laws of the land like those laid down by the people for their own guidance and unformily followed in practice. The Law forms somewhat like the rules of the wellknown games of a people. Most of these rules have been established little by little by the successive resolution of doubtful questions in particular cases. This makes case-law the normal process of the formation and development of law.

The normal process of its formation

Savigny.

Savigny, regarded by some as the greatest jurist of the 19th century, advocated the historical doctrine in connection with the great problem of codification in Germany that came up in the wake of the political changes brought about by the Napoleonic wars. During the period of the French domination, the French Code (Code Napoleon) had been administered in some places in Germany, and its marked superiority in many respects over their own law (consisting of the Prussian Land Recht, the isolated statutes of the different states and the customary laws) was necessarily patent to the German lawyers and administrators. On the restoration of independence, public opinion came to be divided among jurists and legislators in Germany as to whether it would be proper to go back to the old order of things or to build up a single unified national code on improved lines incorporating the excellencies of the foreign laws to make up for the deficiencies of their own system. There could be no doubt as to the deficiencies themselves. The old codes, superannuated and defective in form, consisting mainly of a series of separate antiquated enactments of the Emperors and Princes of the feudal days without any unity or coherence, and a body of common law—a curious mixture of the principles of Roman Law (not as it stood in its classical days, but under a form assumed during the final decadence of the Roman Empire) with a sprinkling of the old Germanic customs—did not at all satisfy the requirements of modern conditions. The Roman Law itself was not sufficiently and accurately known due to discrepancy of the texts; so that the laws were both hopelessly inadequate and uncertain.

The controversy over codification.

Thibaut (1771—1840) stood for codification while Savigny opposed it. The idea behind Thibaut's project of codification involved two assumptions:—(1) that the Law may be made, by enactment, just as the legislator wills it to be; (2) that a Code may be framed enunciating legal principles which would not require any modification and would be perfect and all comprehensive and applicable to all peoples and all times. In his "Vom Beruf" (published, 1814) Savigny combated both of these assumptions with great vigour and insight.

Savigny on the origin of Law in the popular spirit or consciousness.

Like Hugo, Savigny also likens the law of a people to its language. Neither depends on chance or human choice, *i.e.*, the voluntary will of the different individuals who compose a people. "These phenomena—Law, language custom, Government—have no separate existence; there is but one force and power in a people bound together by its nature, and only our minds give them separate existences. What makes it a single whole is the common conviction of the people, the like feeling of inner necessity to which all attribute a contingent and arbitrary origin.[1] " This, together with a passage shortly following it in his Vom Beruf puts in a nutshell the fundamental thought of the Historical School. " The organic evolution of Law with the life and character of a people develops with the ages; and in this it resembles language. As in the latter, as in Law, there can be no instant of rest, there is always movement; and development of Law is governed by the same power of internal necessity as simple phenomena. Law grows with a nation, increases with it, and dies at its dissolution and is a characterestic of it."[2] In support of this position Savigny argues, that Law is prehistoric in all societies, found already established like their language, manners and political organisation, even in those remotest periods of their history in the past of which we can gather any information or proof; and also like the latter, is stamped with the special national characteristies of each. All of these, including Law, are consequently natural manifestations of popular life and by no means product of man's free will (which must have a historical beginning at a certain point of time); in our consciousness, the notion of positive Law is always connected with that of necessity which would be impossible if Law were a creation of our free will.

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[1] "Vom Beruf" pub. 1814. 3rd edn., Heidelberg 1840, p. 8

[2] *Ibid.*—p. 11.

Savigny's theory of Law

The Law, like the language of a people pre-supposes a spiritual unity which must be the basis of communal life. An indeterminate accidental aggregate of men without this unity can not have a common language, law or customs. No mutual intercourse or dealing of the individuals would be possible in such an aggregate—no common life, nor its regulation; in fact such an aggregate would have no reality at all. Whenever we see men living together we find them forming a spiritual unity, and this popular spirit manifests itself in the use of a common language and in the force developed as Law capable of satisfying the need for the regulation of their common life. This spiritual unity of popular consciousness is not limited only to the living members of the existing generation, but embraces also successive generations, the future as well as the past. It is preserved by tradition and is slowly, regularly and unconsciously developed in the people through the slow and insensible course of successive generations in the forms alike of language and Law. Law is thus considered by Savigny as a product of the people's life—as a manifestation of its spirit. It has its source in the general consciousness of the people, where, at first it appears to the people, then not rich in ideas, as an object of immediate belief—as simple rules or principles necessary for the regulation of the vital conditions of social existence and embodied in the material form of current legal formulas, or rather as a series of symbolic actions which accompany the creation and cessation of legal relations. These forms tend to give the Law a fixed form or solidarity which persists in later epochs just as Grammar does in the case of language.

The development of Law.

As in the case of language, and the other manifestations of social life, the law develops in the earlier stages spontaneously and uninterruptedly under the same principle of internal necessity which explains its first appearance. In a civilised society, however, the different sides of national activity, hitherto devolving upon the people as a whole, individualise and separate from each other, and are taken up by different classes or sections of the people like the jurists, linguists and scientists, each class being henceforth exclusively occupied with its own specially assigned function. In the hands of specialists, Law—and here also like language and the sciences—becomes richer in ideas, more complex and technical. It now assumes a variety of aspects—political and technical. Now " there is, so to speak, a double existence : on the one side a general national life, on the other the distinct science of the jurists. The relation of law to the general life of the people might be called its political element; its connection with the juristic science its technical element. The correlation of these two elements varies with the elements of the life of a people but both participate more or less in the development of law."[1] Savigny illustrates this position from the history of Roman Law by a comparison of its early simple foundations—the family law and the property law of early Rome grown out of the general consciousness of the people from before the time of the Twelve Tables—and the complex and technical law of the Pandects.

Fondness of this school for Roman Law.

The fondness of the founders of Historical Jurisprudence (Hugo, Savigny and others) for Roman Law,—an intimacy grown out of their profoundest researches into the Roman Law in all its historic phases including those of the glorious classical period when it reached its perfection,—may have given rise to another tenet, which, though not equally important and relevent for the purposes of general jurisprudence, was nevertheless almost equally characterstic of the Historical School, at least in its earlier stages, *viz.*, that the Roman Law should be accepted by modern nations as their normal law. On account of its inconsistency with the other theories of the Historical School it offerred a reasonable ground for criticism to the philosophical jurists of the Organic school who while accepting and developing the organic character of the connection between law and the other forms of human culture (such as language, religion, science and morality) as preached by the Historical School demurred to its undue and exclusive partiality for the Roman Law.[1]

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[1] Korkunov—Theory of Law, p. 151.

Puchta.

Puchta (1798-1856), a disciple of Savigny, in following up his master's historical treatment of the subject of the origin and development of law, begins with the Biblical account of the origin of the human race.[2] First, we find the family group formed from the start, and consisting of the first human being, the wife formed out of his rib, and their descendants. Then the family multiplied and divided into several families which formed a tribe or people and this in its turn, by a similar process, grew into several tribes or peoples.

His doctrine of the general will.

Thus we see that men never lived without forming some natural organic unity. This unity, founded upon a common origin, is not merely physical, *i.e.*, one of kinship or common parentage of the early members, but also spiritual, which accounts for the natural agreement or unanimity of the members which constitutes the general will of the people.

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[1] Cf Abrens—"Nature Recht" 6th Edn. (1870-1871) 1 Bd., p. 172 *et seq.*

[2] Monograph on customary law "Gewohnheitsrecht" pub. 1828.

Puchta's theory of the State and Law.

Puchta develops this doctrine of general will in his elaboration of the theory of the state and the Law. The people as a natural unit or group is an uncertain assembly in a state of fluidity without any organisation or body, such as is necessary for a definite course of combined action on behalf of all its members. The general will, in such a community, can at most exercise only an indefinite influence over its members in the shape of a natural inclination (arising out of their common origin) shared in common by all; but this influence is too weak to control effectually the individual activities directed against the current of general will or opinion under the stress of some predominating self-interest. It is the manifestation of this conflict between the individual will, swayed only by self interest, and the general will, shared in by the individual himself (for he antomatically knows and feels that, but for this conflict, he would have liked to behave or act differently and that such course if followed, would have secured harmony with others, and the approval of all the members as well as of himself), in the life of a people that brings out the idea of Law. Where there is no conflict at all, due either, to the non-existence of any other will than the individual will, (*e.g.*, where there is only one man), or to one will completely overcoming the others (as where there is only one family and no people, and the will of the head, either a husband or a father, is the sole dominant will), there is no law. It is only in a people consisting of several men and families that the conflict of wills appears which is necessary for the formation of law. But even that is not sufficient; the people as an unorganised natural unit can only generate the general will which carries with it a mere conviction as to what is the law, and exercise, as explained before, just a mere indefinite influence on the members; but in the absence of an organised body (just as the individual will can not be realised in action without a physical organism or body), it can not be executed or realised, *i.e.*, enforced as law in the society. Positive Law must be something realisable in action, in its protection and enforcement, regularly and methodically sustained under an organic system maintained to carry out the general will. This is how the general will of the people, which, itself the result of natural unity, had created the law, is impelled by the necessity of popular life to form the state, *i.e.*, a political (artificial) organisation or body as the organ of its expression. The organisation of the peoples is usually accompained by a delimitation of their territories and the law now becomes a tangible and workable organic system. Thus it is inaccurate to speak either of the people (as the natural unit) or of the state (as the organised unit) as the source of law. According to Puchta the former is the *causa instrumentalis* and the latter the *causa principalis* of the law. The source of the law is indeed antecedent to the state but there is no law before it, *i.e.*, the state's creation.

Savigny and Puchta compared.

In order to appreciate at its true value the contribution of Puchta to the theory of Law it is desirable to compare somewhat closely the respective positions of Savigny and his disciple wherein they are not quite at one with each other. Savigny lays stress on the *necessity of popular communal life*, of mutual intercourse, and, with it, of the curtailment of individual freedom of action for the sake of social solidarity, as the source or cause of Law. No doubt he refers to the spiritual unity or the general popular spirit, as subsisting in men associating with each other and forming a community, but he regards it as lying in the *consciousness* of the *individuals* composing the people, rather than as *the will* of the *whole body* existing apart from and independently of the individuals. We have, according to Savigny, first, the popular life as a communal existence shared by the individuals (urged on, no doubt, by the inherent necessity of their social instinct); next the necessity of abiding by a

Puchta's organic conception or personifcation of the popular will as an objective entity as the source of Law.

principle of mutual accomodation and harmonious action for the purposes of such life, felt alike and in common in the consciousnesses of each member, which, as a whole, represents the popular consciousnéss ; and, lastly, Law arising out of this consciousness. Puchta attaches greater weight to this conception of spiritual unity, and viewing it from a somewhat philosophic standpoint (*viz.*, the organic conception borrowed from Schelling), regards it as the necessary manifestation of a force acting in the organism of popular life and existing independently of the consciousness of the individuals who make up the people. This force is objectified or personified as the popular mind or *will*, which exists, according to Puchta, antecedently to all. Like the soul in the individual organism, it produces and accounts for the spiritual unity, the popular life itself, and its necessities felt in individual consciousness, as well as the Law. Law, according to Puchta, proceeds from the popular spirit (general will) like a plant from the germ with its form and line of development fixed in advance and independently of the common life. Neither the common life nor the individuals participating in it take any active part in its formation. The common life itself is rather shaped by the general will which is the Law and the individuals are only its passive bearers. Both Savigny and Puchta are agreed in tracing the law to a source antecedent to the state; but while Savigny seems to be more inclined to find the source in the popular life or common consciousness, Puchta goes one step further backward into the popular mind, will, or genius as the real active agent which expresses itself in the common life and consciousness and gives characterestic shape, form and colour to both in accordance with its inner nature;—characteristics which alike mark and distinguish the nation, its life and law, and which it is not in the hands of the individuals to make or unmake. Savigny and Puchta are equally at one, as we have already seen, in regarding the state as essential to law, *i.e.*, the Positive Law; Savigny in fact points out (and in this, conclusively refutes the theories of social compact) that a people, by itself "an invisible natural whole" never exists as such without its bodily form or organisation, *i.e.*, the state.[1] The antecedence of Law (minus its bodily form) and of its sources to the state, spoken of by the Historical School, is to be regarded more as a logical than as a historical antecedence.

Analysis of the will of the individual.

Puchta's next important contribution to jurisprudence is his analysis of the will of the individual as a member of society into its two ✓ fold aspects—individual and general. In so far as his will reflects the general will, he becomes a legal person, participates in the formation and development of law, and as himself the source of his own law, is free and independent. This duality of will—participation or conscious reflection in the individual of the general will and the voluntary control by the members of their individual wills by their general will when the two are in opposition to each other—is essential for law. When the dominating will in a society is wholly foreign and not reflected or participated in by the members—as sometimes happens after a conquest in war—the rule is one of natural brute force and not of law; since it could as well enforce what is not law. Law is born in the social body itself which is governed by it—out of the opposition between the individual and the general will of the members themselves. The "general will" of the individual itself is a composite entity—partly foreign and exterior, and partly the individual's own will based upon his personal convictions—both acting in unison as one will. The rule laid down by this will to control the individual (self-seeking) will of man is law; it is not foreign or arbitrary, but implies juridical liberty.

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[1] See Holland. Jurisprudence, Ch. IV.

Law and Liberty.

The key to the main positions taken up by Puchta with reference to Law, its nature and origin, as indicated in the above two paragraphs, which somewhat distinguish him from the standpoint, representative of the Historical school, of his master (Savigny), is that Puchta, in viewing the people and the popular will as organic units, puts the individuals into the back ground and minimises their importance, *qua* individuals, as the sources or authors of law. In conceiving the general will, he holds up the society as an organic whole or unit and puts it in the forefront at the source of law and jurisprudence more prominently than Savigny had done. While keeping to the historical method, he marks a distinct advance of legal theory over the individualistic position of the Historical school typified by Savigny and his predecessors. Towards the middle of the 19th century this tendency to depart from the individualistic position was already in the air and visible in all the spheres of thought—in jurisprudence, philosophy as well as in economics. Traces of it could be found in the Formal school after Kant. Savigny's "popular consciousness" was conceived more as a mechanical enumeration of the consciousnesses of the individuals. Puchta's "popular will" was an independent entity or unit set rather in opposition to or over the head of the individual wills. In this respect, law is set off against morals. The Law arises out of the conviction of the people as a whole; but moral convictions may be

Explanation of Puchta's main positions.

Law and Morals.

entertained by the individual, the family or the people.[1]

The services of the Historical school of jurisprudence may be summarised as follows:—(1) They turned the tide against a jurisprudence which had no touch with the realities of life—a crude doctrine of Law of Nature as it stood in its first phase or stage, and that of social compact,—by pointing out that the juridical speculations upon imaginary states of mankind (not substantiated by history), without showing how the realities of legal ideas, rules and institutions, like property possession or inheritance, take birth and are regulated and developed, are useless and misleading. (2) They applied the historical conception (that of regular historic evolution of every human institution) to the study of Law and its practical fundamental ideas, principles and rules, and sought to base conclusions regarding their nature, genesis, and mode and laws of development on the certain and concrete facts of popular life established by history instead of on mere speculation. (3) They explained the element of "necessity" or "obligatoriness" of Law by a better theory of its origin and historical development independently of individual wills than the doctrine of Natural Law and social contract, because it

The services of the Historical School and theory of jurisprudence was based on certain facts of history; and thus the latter doctrine which had served for a logical explanation of this element was no longer indispensable. (4) By advocating the theory that Law is *found* and not *made*—that it is a historic product of popular life slowly regularly and imperceptibly evolving along definite lines in accordance with the genius and spirit of the race, and incapable of being suddenly and spasmodically changed and put into new shapes and forms (however ethically meritorious they might be) by the arbitrary will of the legislator, they represented a safe, healthy and orthodox line of thought and resisted the tide of revolutionary ideas and aspirations that had fostered round the doctrine of Law of Nature, and, after having been instrumental in bringing about the political, social and economic revolutions of the latter part of the 18th century and their accompanying evils, had, instead of spending itself, seemed rather to have gathered strength through the elation of success. (5) Though somewhat unsuccessful in this direction, they sought, by their theory that Law is not a code of absolute immutable principles, to warn the enthusiasts of legislation against the fallacy of supposing that a code could be made as perfect and comprehensive as would meet the legal requirements of all peoples and all ages; and, by establishing that law, by its very nature, must be always in a state of spontaneous flux and growth, explained that codification not only introduces forced changes into the present state of the laws but also prevents their healthy natural development by putting them into a rigidly fixed form.

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[1] **Berolzheimer—p. 214.**

The deficiencies of the Historical theory.

But the Historical theory had also its defects; and this is why it did not succeed in crushing the doctrine of Law of Nature nor that of the arbitrary formation of Law altogether. To prove, in opposition to the school of Law of Nature, that Law is not eternal and immutable, it preached and established the doctrine of its relativity to the people or society,—the popular spirit or genius. The relativity of Law, as upheld by the Historical theory, was partial, coming midway between the theory of universal and immutable Law of Nature and the theory of absolute relativity advocated by those who affirm that Law is the product of the will of the state exercised either arbitrarily, or as influenced by climate, time, place or environments. On the one hand, certain necessary and invariable traits and elements noticeable in all the legal systems of the world, especially in the modes of their evolution and development, and indicative of their basis in some universal characteristics of the human race not limited to any particular nation or people, are left unexplained. Prof. Korkunov[1] observes :—" It does not determine the connections between what is national and what is universal. But it is precisely in the development of law that one observes some common characteristics in spite of the complexity of national legal systems. Legal development in the most different peoples presents always a certain uniformity." On the otherhand, in assuming that, within the sphere of a given nation or people, the inner characteristics of law and its development are wholly fixed and pre-determined by the national spirit or genius, as those of a plant are determined by its seed, it understood historic development in too narrow a way. It regarded the advance of legal ideas and principles as organic and not as a progressive and creative development. The type itself was taken as rigid and incapable of change or evolution, and all subsequent development as merely an elaboration of what was already in the law in a latent or embryonic form. This precludes the possibility of any purposive improvement in the law. It conceived the popular mind as incapable of changing or evolving itself by reception of new ideas foreign to its original constitution. In repudiating the theory of the arbitrary formation of law, it goes to the opposite extreme of regarding individuals as passive automatons whose individual consciousness, will or interests counted for nothing in the formation or development of the law. The human mind, and its manifestations in human institutions and legal ideas, are thus placed on a level with that of plant or animal life, and all intellegent attempts at the amelioration of the law are discouraged as abortive. The popular spirit or genius, upon which so much stress is laid, is, moreover, taken for granted without any explanation as to how it is formed; and once the distinctive features and elements of the popular spirit are detected (by a historical examination of its manifested forms and developments), all subsequent developments and improvements of the law of the people are supposed to be unalterably fixed by inexorable necessity and logic, and, therefore, capable of deduction like the rules of higher mathematics from its first principles. This is, in fact, exactly what was assumed by the theorists of Law of Nature when they sought to deduce the whole Code of Nature from some supposed characteristics of human nature or from some fundamental principles or postulates of human reason; the only difference being that the latter sought to arrive at a universal code for the whole human race, while the former restricted the operation of the legal principles and rules deduced from the supposed nature of the national spirit to the particular nation or people in question. The Historical Theory, in so far as it encourages the deduction of legal principles from this assumed idea or conception of the popular spirit or will, and their practical application to concrete cases is a "theory of conception" very much like that of Law of Nature.[1] On account of this initial error their conclusious were faulty and incomplete. They were correct so far as they went; but they did not go far enough when they proposed to find a solution as to the ultimate foundations of law; and they were mistaken when they assumed that, given the law as it was at the root, the subsequent forms and developments were only to be ascertained by a process of deduction.

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[1] Theory of Law, p. 120.

The post-Kantian Philosophy of Law also takes up the problem of historic evolution.

I have already told you that the necessities and considerations that led to the rise and growth of the Historical School and theory of Jurisprudence, founded on the empirical-historical method, also moved the Philosophical school after Kant to recast and remodel their points of view and lines of enquiry and to reach better results. The Formal theory of Law was too abstract and too utopian. However lofty as regards the ideal, and logically acute and metaphysically sound with reference to the ultimate foundations of the law, the Kantian legal philosophy did not concern itself with the evolution of law, or the course of development of the society or the social order with which, jurisprudence must be, above all, associated, if it is to be of any practical value. We accordingly find that, while or even before Hugo, Savigny and Puchta were elaborating their historical theory of law and its development along empirical lines, the philosophy of Law was being directed in its own way towards the same question of the historic evolution of the universe, and along with it, of human institutions and Law. The difference between the two schools consists in this, that the Historical school sought out a principle of evolution and theory of law which is limited to each race without aspiring to an explanation of the characteresties of social and legal evolution common to the whole human race; and their procedure was mainly based on the facts of history which, though they were interpreted by the light of some sort of philosophical or metaphysical theory (and this, in the philosophically surcharged atmosphere of Germany was unavoidable), were mainly gathered by the empirical process of observation and historical research; while the Philosophical school sought for a universal doctrine of historical evolution of the world, including the human race and its laws, from some universal and ultimate metaphysical source, prius or background of the manifested worlds of mind and matter evolving along lines fixed by its own inherent nature. Schelling, Hegel and Herbart, especially the first two, stand out as most conspicuous in the first half of the 19th century as the leading exponents of this philosophy of evolution. Each had his own characteristic way of grappling with the problem and laying the foundation of a different school of Philosophy. They may be respectively taken to be the founders of the Organic, the Metaphysical (dialectical or logical) and Mechanical—Aesthetical philosophies of world—evolution (including Law and its historic developments).

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[1] Bekker—quoted by Berolzheimer—p. 214, Bergbohm—Jurisprudence p. IX, pp. 109, 522,

Of the post-Kantian schools of Legal Philosophy, that which stood closest in touch with the Historical School and had in fact inspired the latter with the historic idea of organic development was that of Schelling. Fichte, Schelling and Hegel may be respectively described as the exponent of subjective, realistic or objective, and absolute idealism. Fichte put

Fichte

into the greatest prominence the individual ego and its free activity for self-realisation as the central point of his theory of knowledge as well as of his philosophic system, and set up individual liberty as the ideal of law. He assimilated objective nature to the subject, and took it to be only the negative aspect of the Ego (the subject): so that, for him, the world was only a system of individual egos each seeking expansion or self-realisation, and Law was the moral order which regulated this self-expansion of all the egos without conflict and in harmony

Schelling.

with each other. Schelling begins, like Fichte, with the assertion that cognition is not possible without limitation. Mind and matter are the opposing forces which, limiting each other, result in the cognition of both. Nature is thus the counterfoil of mind and the two together are united in the absolute. Nature was regarded by Fichte as the projection of the Ego. Schelling regarded Nature and the Ego as the complementary phases of the absolute unity brought into existence by its disruption. This disruption of the absolute into its two opposing and mutually limiting aspects of subject and object, mind and matter, is due to the necessity of its attaining cognition or self-consciousness. These opposing aspects are regarded merely as the polarities (as in electricity or magnetism) of the absolute. Nature is objectified reason and mind is subjectified reason; and they must fit in with each other just as the organism fits in with the soul embodied by it. The whole universe is thus the expression of the absolute as a huge organism with its two polarities of mind and matter; and its different forms, through the whole course of universal history, are different stages in and towards the attainment or realisation of its ultimate ideal, *viz*: full and perfect self-consciousness. Philosophy is accordingly to be divided into the philosophies of Nature and of mind (spirit). Idealism seeks to resolve Nature in terms of mind, and

His Philosophy of Identity.

Conception of the universe as a huge organism.

materialism desires to derive mind or intelligence from nature. Both are, however, but two poles of one and the same knowledge (philosophy) equally necessary and coordinate, seeking and leading to each other.

Schelling's philosophy of nature

Nature as, the visible organism of the mind, will be able to produce nothing but what is reason and law. It is the business of philosophy to demonstrate the identity of the world of nature and thought, as the outer and inner expressions of the absolute. Nature everywhere is an oscillation between productivity and production—an incessent activity of the absolute seeking full and infinite expression, but retarded by an opposite force which keeps the former from exhausting itself by one supreme effort; and an infinite gradation of series of finite limited products is the result. But for this opposing inertia, the infinite activity or productivity of nature would have produced at once, with infinite velocity, an absolute product, which, for its very want of limitation, would be incognizable. The finite products of nature, as we see them, are the results of limitations put by the opposing force with an infinity of reactions on the productive activity of Nature; but these products are always in a state of flux or evolution, and, as soon as produced, are immediately transcended by nature in order that the absoluteness of the inner productivity may be satisfied through an infinite series of cognizable finite products. The retarded effort of Nature to reach perfect expression and self-consciousness at first produces the finite forms of inorganic nature which, rising in a gradient, display first, only passive properties, (*e.g.*, gravity or weight), next chemical combination (*e.g.*, combustion), and the fewer active properties of electricity and magnetism,—the last representing the highest form of expression of the activity in inorganic nature. Rising up then to the organic creation, the activity of nature expresses itself, in order, in reproduction, irritability and sensibility, corresponding to the three active properties (chemical combination, electricity and magnetism) of inorganic nature. There is thus a parallelism or reciprocity between the inorganic and organic worlds, indicative of a common vitalising active principle generating and giving continuity to both and making the former subservient to the needs of the latter. The same force expresses itself in both, in higher potencies in the organic than in the inorganic nature. The Absolute, at first an identity, in which the duplicity of the opposing forces lies latent, split up in the process of creation of the world into polarities of opposing influences to realise itself in gradually developing forms and activities and manifestations of the inorganic and organic worlds till the final stage of organic development is reached, with the polarities highly potent and clearly distinguishable in the cognition and sensibility of man. This makes out the universal organism of Nature as Schelling conceived it.

The Philosophy of mind or transcendental philosophy.

The Philosophy of mind, which, according to Schelling, is philosophy of nature turned inward, has likewise to trace the history of developing consciousness from its most rudimentary forms and through various grades of developing phases till it reaches its highest potence. At first the intelligence in its very origin is the slave of the object (the opposing force). It then has the form of mere sensation. Gathering strength in course of evolution, it step by step rises to perception (still passive) and imagination (productive perception), external and internal perception (with deduction of space and time and the Kantian categories), abstraction (distinction of intelligence from its own products), and self-conscious will. Reaching this stage of aloofness or will, it now turns to acquire mastery and exercise control and disposing power over objective nature (the opposing force) and its laws, to become consciously productive or creative, and to reach the stage of free and conscious self-determination. But this again has to be attained through an infinite series of advancing stages, for the expression of the subject is, even here as always, restricted and retarded by the physical antagonism of nature, as also by other subjects in the moral world; or in other words, the individual will is restricted by the general will in the organism of the universe.

The general will.

Now here, the objective environments of the individual self-conscious Ego, (*e.g.*, the other Egos and the external physical Nature) are regarded in their totality as the "general will." This is the opposing force that limits or restricts the productive will or activity of the individual ego, and their relative strength marks the position of the ego in the scale of evolution, The feeble, almost extinct, 'subject" or 'will' in an inorganic body is opposed by an overwhelming or crushing object or objective will. It is accordingly unconscious. The subject is free and stronger in man, and the ego here has attained cognition. This freedom increases and the opposition of the 'general will' correspondingly decreases as the evolution proceeds, and the Ego seeks by its free activity to conquer nature. The inanimáte nature is conquered by the development of human knowledge and science, and the freedom of the ego as against the opposition of that nature, is perfected in proportion to the extent of that development; and, so far as the opposition of the other egos is concerned, it is conquered and the freedom of the ego established by all the egos being attuned to the moral order which is the "general will" or the will of the absolute. When this moral order is established

The moral order.

The harmony of free will and necessity.

there is no longer any conflict between the desires and free activities of the different individual egos for self-expression or realisation, no opposition between the individual and the general will. We have then the ideal *state* in the harmony of *freedom*, (*i.e.*, of the Ego) and *necessity* (the objective general will of the absolute). In this ideal *state*, every individual has the return or fruition of his free activity assured to him by the general will which now cooperates with him instead of opposing him. Schelling's views are practically identical with Fichte's on this point. So long as this perfect harmony is not established, the state represents the adjustment, in more and more improving forms, of the opposition of the ego and the general will in a society, thus constituting an evolving organism within the cosmic organism of the universe (the universal state). Positive Law thus becomes the necessary form—and a constantly shifting and developing form—of Natural Law, according to which the absolute realises itself through the historic evolution of the universe.

Law.

Law expresses the harmony or balance of the opposing and mutually restrictive individual (subjective) and general (objective) wills, and lays down the sphere of permissible free activity of each individual. As laying down the limitations of the free activity of the individual it is resolvable into its two elements :

one, the general permission to be freely active (which corresponds to the self-assertion of the ego); and the other, the limitation or restriction thereof within a given realm (which corresponds to the opposition of the general will). They respectively constitute the content and form of the organism of law. The supreme end of all evolution being the realisation of self-consciousness of the absolute, through an infinite number of finite egos each of which has attained, and maintain in unison, the perfect freedom of activity, the object of both Law and Ethics is to promote the identification of the individual and the general wills by which alone this freedom can be reached. Ethics seeks to train and mould the individual will in the path of duty so that it may freely and voluntarily identify itself with the general will. Law proceeds from the opposite direction and tries to mould the general will so that it may (by yielding the maximum accomodation for the free play of the individual will and by the most liberal recognition of the individual's rights) identify itself with the individual will. So in the highest stages, Law and Ethics coincide.

Law and Ethics.

Schelling's philosophy thus became the immediate predecessor and inspirer of the Historical School as regards the theory of historic evolution. His realism (which, however, to some extent, he abandoned in his later writings) made his ideas more acceptable to the school of Hugo and Savigny; and he himself claimed his philosophy to be a positive, instead of an idealistic or transcendental, system. He took for granted, as a matter of philosophic intuition, the reality of the objective nature, and its projection from the absolute as well as the reality of the Ego; and the perfect correspondence or identity of the two (Ego and Nature), due to their common descent, as opposite polarities, from the same original absolute. Dr. Berolzheimer thus compares him with Spinoza:—"Schelling took over pantheism from Spinoza, but instead of the dogmatic pantheism of the latter, he advanced a critical pantheism. Spinoza's pantheism is thorough-going; to him the world is the emanation, and consists, of universal substance. Schelling's pantheism went through the stages of the critical idealism of Kant and Fichte and assumed a critical form. The world or the absolute became the mere accident of the rational Ego. The philosophy of Spinoza and that of Schelling favoured the doctrine of identity; that is they assumed the identity or unity of the subject and object. But Spinoza placed such unity in the absolute object while Schelling placed it in the absolute subject."[1] Schelling's conception of the universe as an organism was, however, original. Natural Law

Spinoza and Schelling.

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[1] Legal Philosophies (Vol. II of the series), p. 235.

as an eternal unchanging body of principles is thoroughly discredited; and it is, on the other hand, supposed to represent the principle under which the cosmic evolution takes place, expressing itself, in the external inanimate nature, as laws of physical nature; in organisms and animals, as laws of organic nature, and so far as human communities are concerned, as moral law, which in its turn, is represented from time to time by the series of evolving positive laws of the different societies.

Schelling and the Historical School.

The difference between Schelling's treatment of History and Law and that of the Historical School is that the latter regarded History and Law as limited to the facts of particular races or societies, thereby destroying their universality. These special facts are, according to Schelling, realities limited in space and time, but, regarded as expressions of ideas, (*i.e.*, of the absolute) they lead to the universal science of history and jurisprudence. Both are equally in touch with the real and the ideal; and thus are as much distinguished from Philosophy, which holds aloof from reality and is wholly ideal, as from mere empirical collections of facts, past and present, of particular societies divorced from relations with the ideal. The Ego in its perfection sees absolute concord between its inner nature and the external nature surrounding it and sees teleology or design as well in the unconscious external nature as in its own activities. This is the Philosophy of Art. The historic art is that which is able to see through the various apparently accidental and designless evolving facts and forms of associated life in the world the realisation of a universal disign and to present it as the teleological development of one original activity of the absolute directed towards its completest self-realisation in consciousness; and legal science likewise deserves the name and reaches the highest stage of "art" "only so far as it is open to an historical (and artistic) and not merely pragmatic study, that is only so far as it may be setforth, in its legal determination, as a component of the absolute—as the expression of a supreme idea."[1] Dr. Berolzheimer takes this as a suggestion thrown out by Schelling, that in Jurisprudence, such as it should be, the private rights and duties of a citizen, *qua* individual, should be attuned with the public rights and duties, so that may mutually correlate and correspond, and may thus mutually further the cause of the individual as well as the state instead of being placed in opposition to each other as hitherto done by the individualistic theories.

The Philosophy of Art.

Both Schelling and Hegel were exponents of the process of universal evolution; and all sciences were, according to both, correlated to the one universal science of evolution. Hegel however, substitutes absolute thought or pure consciousness " in its freedom from all material crassitude" in place of Schelling's absolute (which is neither thought nor being, but the common indefinite source of both) as the prius of the subjective and objective universe and the universal evolutionary process. In common with Fichte, he places 'idea' or 'thought' in the foreground (and derives matter or object from it); but it is not that of the individual Ego, but of the absolute, *i.e.*, thought in itself or pure thought, that, by its own inherent logical necessity, develops a process which gives rise to the individuality of the subjects and their finite objects and their subsumption in the universal subjective and objective nature. The kernel of Hegel's philosophy is his logic—the transcendental logic—which discloses the necessary process of thought which itself is the absolute.

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[1] Berolzheimer—Leg. Philosophics, p. 210.

Criticism of Schelling's philosophy.

Schelling's philosophy is thus criticised by Hegel: Neither is the absolute with its supposed characteristics an object of intuitive assumption, nor is the universe in its two aspects an arbitrary fiat of the absolute, shot out like a canonball by way of self-diremption; but they are respectively thought-in-itself and its necessary logical products. Schelling, by regarding the absolute as neither thought nor matter, could not explain why the indifference or identity of the absolute should suffer a transition from it to the definite, the differentiated, or the real; *i.e.*, how it was possible for the wave of manifestation to appear in its absolutely indifferent constitution. Hegel, by regarding the absolute as *thought*, explained by his logic the inherent necessity of its manifestations as well as the process by which it is sustained.

I shall not tire and puzzle you by leading you into the depths of this abstruse logic of transcendental thought by which Hegel overcomes the failure of Kant's 'Analytic' to reach the "thing in itself." Our thought, according to Kant, can not know the objective thing-in-itself behind the sensations. Hegel seeks to establish that pure thought itself is the pure reality or being; and the individual mind and the objects of perception are equally the results of the pure thought operating according to its inherent logical necessity. They, (*i.e.*, the individual mind and external objects) are therefore equally real, as necessary logical counterparts of each other, *i.e.*, as moments of the self-manifestation of the absolute thought. Their only unreality lies in their being passing phases of the 'real' absolute thought which is the only "thing in itself" behind both the subject and the object.

Fichte had somewhat anticipated Hegel in describing this logical process of thought as consisting of thesis, antithesis and synthesis. According to Hegel, pure Being and the thought of Being are the same (thesis). This

Identity of thought and being.

'thought' logically involves its negation; for without this negation of, or contrast to, itself (antithesis) there could be no consciousness or thought at all. It is a necessary logical process of thought. A comparison of 'Being' and 'Non-Being' brings out the synthesis, *i.e.*, the thought (category) of 'Becoming' or origination; and this again, by necessary contrast involved in itself, brings out the thought or category of termination or decease. Thus, by gradually rising series of three fold logical thought processes, we arrive at the categories (as well as the corresponding objective realities) of state, (a passing condition), quality, and reality; number (one and the many), quantity, degree, and measure; the universal essence (one in the many) and its opposite, viz., the variety of particulars or manifestation. The same logical process yields the cognate categories (and existences or realities) of substance and its accidents, causality and reciprocity. This category of reciprocity synthesises the "substance" or 'essence' and its diversified 'attributes' or 'manifestation,'—the 'cause' and the 'effect,'—and we get the highest category of 'concept' or 'notion.' The subjective notion when analysed, resolves itself into three moments:—the universal, the particular, and the singular; of which the first refers to the essence or genus, the second to its particular manifestation or species, and the third to the

The dialectics of thought.

unification of the universal and the particular in a concrete individual. Corresponding to the subjective notion or thought there is the objective or external unity of self-dependent realities or existences in the genus, species and individual. You will here perceive the realism (as opposed to nominalism) of Hegels' idealistic philosophy. He regards the "idea" (c. f. Plato) as the highest logical synthesis of thought; and therefore it is also, in accordance with his idealistic realism (or realistic idealism), the highest reality, in which the subjective and objective notions (the latter being only the former projected into objectivity by antithesis) are subsumed in a higher unity. Beginning with pure colourless thought as the prius, Hegel weaves his philosophy of nature and spirit into this logical scheme, and ends at the apex wherein all particulars (subjective and objective) are subsumed in the universal notions; and they are, in their turn, and in both their aspects, subsumed under the absolute superconscious '*Idea.*' Pure thought having projected itself into subjectivity is now returned to itself with its necessity and mission fulfilled.

Hegel's idealistic realism.

The absolute superconscious idea.

Hegel's Philosophy of Nature.

Pure thought, by its inherent necessity of antithesis, involves self-externalisation in objective nature, as space and matter. Just as thought develops its categories (in accordance with the logical necessity) in an ascending scale, seeking higher unities through diversity, so matter develops into the stellar and planetary world system under the regulation of the mechanical laws. Inorganic physical nature and its properties meet their antithesis in the chemical process; and the two together give rise to the higher synthesis of organic life and growth. Nature attains individuality with self-end—the instinct of self-preservation and self-seeking—which is the synthesis of universality (*e.g.*, space and matter and mechanical laws), and particularity (*e.g.*, the physical and chemical properties of matter), in organic life. The higher individuality, in which the first stir of subjectivity is felt, appears in the vegetable organism; and its more developed stage is reached, through rising stages in the animal kingdom, in man.

'The philosophy mind (spirit.)

Hegel's whole scheme is founded on the theory that all evolution arises out of the pure thought first objectifying itself (by its own negation) in matter and recovering itself again in a higher synthesis by which the objectified matter is again subsumed into the higher unity of the spirit or idea. We have found its application in his philosophy of Nature, in which he traced the development of the first forms of matter (viz., space and the crude materials of the universe) from its dead inorganic stage, through the various forms of budding life and integration, into the subjectively conscious stage of humanity. In the philosophy of mind, the further evolution of the human soul is traced. At first it is only a natural spirit, and, as such, the subject matter of anthropology in the narrower sense, without any power of individual self-assertion ; not liberated from the bondage of nature, and wholly influenced and characterised by external environments and natural conditions like the climate, the seasons, the geographical position, and the peculiarities of the race, its bodily form and mode of living. These, as well as the natural peculiarities and predispositions of the individual body,—its age, sex, sleep, temperament, family idiosyncracy, &c.,—all go to form its intellectual and moral character. It is the stage of blind sensation. In the next higher stage, the spirit, now freer and able to abstract and find itself out as a unit in the midst of the hustling sensations, appears as a conscious individuality or the Ego. The lower natural consciousness which had been interwoven with nature thus becomes self-consciousness by distinguishing itself from nature and rising to the pure thought of personality, *i.e*, to the knowledge of itself as the free Ego.

The natural spirit.

The Ego

Next comes the assertive activity of the self-conscious Ego,—its attempt freely to appropriate the objects of nature—which brings it into conflict with the other Egos which are likewise bent on self-assertion. This sharp antithesis of opposed activities produces a synthesis, viz., that of the social order or state. The self-centered consciousness of the Ego emerges in the end as the common consciousness (popular universal spirit or consciousness) that has found the due mean between despotism (blind self-assertion) and servitude; that is to say, as the veritably universal rational self-consciousness which regards the neighbours not as hostile (*i.e.*, by way of antithesis), but as identical with itself, subsumed under its higher synthetic unity The spirit now becomes free in consciousness, not limited and bound down by its natural egoism, which has been, by this time, thoroughly subdued. It has now its self-consciousness attuned to that of the others and sees its identity immanent in all Egos.

The Ego freed or universalised in consciousness

The free universalised will

The philosophy of Law; legal person, legal right and the state

Similarly the practical spirit or will becomes also free (*i.e.*, free from the slavery of the objective appetites, desires and passions which individualise it), and identified with the general or universal will. The freedom of the spirit, in both its aspects, is realised in the state—in the legal right, by which the freedom of the will of the individual is objectively recognised in society. The individual is now recognised as a legal person (having rights). The rule of right is " Be a person and respect others as persons ;" so that to each is secured an external sphere of freedom,—of free activity regarding his person, possession and property, of free enjoyment, as well as of disposal by

Contract. contract. The relation of contract, however, concerns only private right and property. Public rights, duties and institutions. Public rights and duties, the State, the civil and political institutions, and the rule of right itself, as stated above, are not based on the individual will or contract. They are the outcome of the world process--of the universal will or the objective spirit (as opposed to the subjective individual spirit)--by and in which the individual attains his freedom. Civil wrong Civil wrong is the division (*i.e.*, non-coincidence) caused by the subjective will individualising itself against the right-in-itself or the universal will; and penalty is the restoration of that Penalty supremacy of the right or universal will as against its temporary sublation or negation occasioned by the particular will. Punishment. Punishment therefore (even including capital sentence) is not a mere weapon or means to be justified by a plausible end, *e.g.*, prevention, correction or intimidation, but is its own absolute end—the fulfilment or self-manifestation of justice and right.

Law and morality. So Law and Right is the objectivity of free will realised by the State, by the objective adjustment of spheres of free activity allotted to individuals in accordance with the universal will. Morality is the subjective self-attunement of the individual will with the universal will; so that when morality is realised, there will be no possibility of the violation of law and right. The freedom of the individual will is objectively protected by the law and subjectively realised by morality. The ordering and regulation of the outward manifestation alone of the individual activities (together with the direct intention behind it) is the concern of right and law ; while the remoter intentions and motives, the desires and passions which fetter the free will of the spirit and tend to prevent its identification with the universal will, are proper subjects of moral reflection or morality. When the attunement of the universal and individual wills is complete and every free activity of the individual naturally and spontaneously, and without requiring any moral reflection, corresponds and tallies with the universal will, the identification of the will and " the good " is established, and 'morality' is converted into the (" sittleichkeit " or) ethical spirit or the natural aspiration of the will towards the good.

The natural objective counterpart of this ethical spirit is represented first by the institution of marriage and the family. The family grows into the *civil society*. The members of the civil society retain their independence and individuality in spite of their association and unity brought about by their mutual wants and necessities, the establishment of law and authority for the protection of person and property and the external ordinances of police.

The Civil Society and the State.

Here (in the civil society) the law, authority and police are only means to further the ends of the individual. But the State represents a union higher and closer than that of the civil society; for here the individual is wholly merged in the corporate existence, and is only a means to the end, *viz.*, that of the corporate state. Thus Hegel, in fact, advocates the ancient political idea, resuscitates the conception of the Greek city state, and sets it up in opposition to the individualistic conception (of Recht stâât) of Kant and Fichte. The end of the State and its order is not merely police, but something higher, *viz.*, to raise humanity to perfection—to the Idea of the Absolute—to the domain of free universal reason.

The culture-stâât

Summary of Hegel's legal philosophy.

Let us now gather together the main propositions developed by Hegel in his Philosophy of Law. The State and the Law are evolutionary products of reason, whereby the non-moral subjective will of the individual transcends its isolated existence, through purification of the instincts, and is absorbed in, and identified with, the moral collective (objective will) will, attains true freedom (individual as well as collective), and realises its true nature in reason. The structure of the Government and Law, as the objective counterparts of the subjective emancipation of the will, accordingly evolves, through successive periods and processes of legislation (and other modes of legal changes), *pari passu* with the progression of this emancipation of the will along the necessary logical line of self-development of reason or pure thought. He thus goes a step forward in conceiving the State not as mere "Recht staat (Kant's idea), but as Culture-stâât; as being, in its perfect from, the supreme expression and development of morality, and meeting, at each intermediate stage as it proceeds towards that supreme ideal, the problems and requirements of the cultural evolution of the popular consciousness at the stage. He thus again brings law and morals together which had been so rigidly separated by the Formal school. The State is viewed as the corporate organic existence—as a personality in which reason is manifested as the collective folk-spirit, and in which the subjective individual wills are merged and identified. The sovereignty therefore belongs to the state and not to the people. The states, in their intercourse with each other, are next subsumed, by a process of higher development, in a universal state; by which the particular folk-spirits are developed and perfected in a universal spirit of absolute reason of which the universal law is the supreme expression[1] The law of the state furthers the freedom of the individual by clothing him with legal rights and thereby converting him into a legal person and investing him with property and right of contract, *i.e.*, mastery and freedom over and in respect of an assigned part of the material objects around him. Hegel's conceptions of legal person, property and contract are thus assimilated to his general philosophy of evolution, *i.e* , of rational self—realisation and freedom of man; and it is likewise also with his theory of crime and punishment, which are regarded by him respectively as the negation of law and right and the latter's automatic self-restoration by just retribution as a logical postulate.

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[1] Grundlinen—pp 312 *et seq*

In connection with this last topic of crime and punishment, we may, in passing, note here the position of Schopenhaur which, in this as well as in many other respects, is the opposite of Hegel's. Schopenhaur (1788-1860)—was also a post Kantian philosopher, and an apostle of freedom, but his freedom of will was not sought in the world of experience, but in its negation; not, like Hegel, through identification with the objectively manifested and moral collective will, but in resignation, negation of the will to live, pessimism and the Budhistic "Nirvana." The world of experience is one of bondage, full of agony and wrong. Right is merely negation of wrong or injury. Positive law, justice and punishment are all really negative in character, being meant for the prevention of wrong and injury which are antecedent to, and independent of, the former. They are directed to the

Schopenhaur.

future and not to the past, and this distinguishes punishment from revenge. The Natural Law, which is the pure ethical law, exists as a pure science of Law independent of all statutes; and it strives after a world of pure intellection where there is no wrong as in the material world. In diction, and in the treatment of the philosophical studies, he derided and opposed Hegel's stilted and laboured grandiosity and struck out a new and simple style of expression and thought easily accessible to the people.

Berolzheimer's reflections

Dr. Berolzheimer thus summarises his critical estimate of Hegel's contribution to legal philosophy[1] :—

"The evolutionary idea dimly suggested by Heraclitus attained its renaissance in the nineteenth century; not without precedent, it appeared in a dual aspect. In its realistic formulation it led to the doctrine of evolution as expressed in natural science represented by Goethe, Lamarck, Darwin, Spencer and Heckel; its idealistic formulation appears in Schelling, Hegel and Kohler. It is Hegel's greatest merit as a political philosopher to have replaced the "Rechtstáát" by the "Kulturstáât," to have accomplished the affiliation of law with culture, and to have established the justification of the several evolutionary stages of law and government.

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[1] *1* Leg. Ph. p. 230.

"It has frequently been noted, more commonly by way of adverse criticism, that Hegel's philosophy of Law and Government was directed to the theoretical justification of the Prussian State of his day. In a measure such is the case. Just as Rousseau in his "Discours" afforded a philosophic foundation for the French Revolution; as Wolff became the theoretical representative of enlightened absolutism, and Kant the apologist of the State as a legal institution; as Fichte, the statesman and Schelling, the romanticist, aroused the German national spirit: so Hegel's philosophy of law, sounded the key note for the intellectuals of the rejuvenated and awakened Prussian state. The environment, the spiritual temper, from which Hegel's philosophy of law emerged, was likewise the culture to which the Prussian State owed its growth and consummation in the recognition of the State as the supreme representative of moral force and strength—the recognition that the State is designed and called to fill a mission of culture, and to fill it in such a manner that the State shall not exist for the individual, nor yet the individual for the State, but that State and citizens shall enter in common the service of a definite cultural ideal, whereby the community and the members thereof shall advance, each according to his capacity, the progress of man. Simply expressed, Hegel conceived the State as the bearer of culture and thus supplied the theoretical foundation of the Kulturstáát which was accepted as the ideal of the newly awakened Prussia.

"The weakness of Hegel's position is that attaching to the doctrine of universal flux. In a system in which everything is set forth as in course of evolution, there are lacking fixed points of attachment, in the eternal stream. As an historian Hegel may retrospectively divide the stream of phenomena into periods; but as a political philosopher, he fails to find a basis for government and Law. The position of vantage accruing to the community and the individual through government and law, the vitality of the law, is a truth momentarily revealed in Hegel's philosophy of ownership; but no sooner does it appear than it again is lost. For this truth contrasts sharply with Hegel's entire position in so far as his philosophy divests government and law of reality and reduces them to a mere emanation of an abstract dialectic movement. As a legal philosopher Hegel advanced many significant truths; but his abstract train of thought brought him, in many respects, in direct contradiction with the facts of the law and its evolution."

The above represents the attitude of a representative Neo-Hegelian towards Hegel, and marks the tendency of modern legal philosophy to accomodate reason and logic with blind force and necessity—the illogical and hardly accountable facts of real objective life and nature—to a greater extent than was done by Hegel. Neo-Hegelianism introduces, as we shall see hereafter, a larger dose of scientific realism in deference to the positivistic atmosphere of the modern world in the latter part of the 19th century.

Comparison of methods and conclusions of the Historical and Metaphysical Schools

It is apparent, from a comparison of the respective positions of the German Historical School and of the German Metaphysical School,' that they represent two sides of the same principle, viz., that of flux or historic evolution of law and institutions. It is a mistake to call the Historical School pure empiricists; for they also start with, or, at least, develop, abstract conceptions like popular spirit, genius, or will. It is equally a mistake to call the Hegelian an absolute idealist, for his idealism, unlike that of the Natural Law doctrine of the early dogmatic rationalists or of the Formal (conception and) school of Kant, was closely related to the concrete facts of evolution which it seeks to explain. Their respective realism and idealism mark out a difference, more of quantity than of quality, of degree rather than of kind. Their professed methods are indeed wide apart from each other, —wider than their results. The Hegelians aim at universal truths obtaining in all societies; whereas the higher generalisations of the

Savignians are confined within a people or nation. The Hegelians profess to proceed by way of deduction, according to the strict principles of dialecties, from some abstract hypothesis about the ultimate reality; whereas the Historical School seek to establish their conclusions on observation, history, and induction. But in reality, even in their methods, there is much less divergence than what appears on the surface. Reading through the laboured programme of logical categories worked out by the legal metaphysicians in order to evolve, out of some absolute fundamental prius, (*e.g.*, the Absolute, the Idea, pure thought, Ego, &c.), synthetic principles which explain or regulate concrete facts of experience like the State, Positive Law, rights, justice, punishment, &c., one can not help suspecting that most of these conclusions are not really synthetic at all; that, in fact, the experiences, and the conclusions suggested by them, were really antecedently present in the mind; and the philosophic scheme, elaborated to account for them, was really made "to order," to fit in with the realities and conclusions, by a tremendous effort of intellectual gymnastics. Thought, by its logic, is made by Hegel to create the world (*i.e.*, its subjective counterpart in thought), exactly as God, the Absolute or Nature has created it; but we may shrewdly suspect that Hegel had acquired his knowledge of the world and its evolution first by facts of experience, exactly as the Historical

School did, and then coerced his philosophy, "thought" and logic to paint a portrait or likeness of what he had empirically gathered, and to make up a show of "creation" out of borrowed materials. The Historical School conversely made a show of faithfulness and constancy towards the scientific method—experience and induction—but their generalisations were. as soon as gathered, raised to the level of absolute eternal principles and truths—to something like the older Laws of Nature; and their pseudo-Natural Law became equally rigid and incapable of real development or evolution, and amenable to nothing but deductive elaboration, or spinning out, of what is professed to be already latent or implied in its content. The defect of this method, of the schools, became more and more apparent, as the course of historic development of European societies took new directions and assumed new shapes not quite in consonance with the individualistic prognosis that might or could have been made regarding the same according to the Historical theory; and what passed fairly well for explaining the past was hopelessly inadequate for the requirements of the growing present or of the brewing future.

The Hegelians.

The Hegelians,[1] in the first half of the 19th century, undertook the material development of Hegel's outlines of the Philosophy of Law by filling in details of the Positive Law into the philosophic scheme of Hegel. Gans (1798—1839) attempted to deduce an elaborate amplification of the scheme to explain the development of the private law of inheritance. Hegel's influence is also noticeable, among others, in Karl Marx (1818-1883) and Lassalle (1825-1864), who, drawing their inspiration from St. Simon, applied the dialectic method in the direction of economics and social philosophy. Gans, for instance, regarded inheritance ab-intestato as the result of necessity, as in eastern communities and in the early days of Rome, and the testament as the product of liberty, as we find it spreading in the Latin world in the wake of Roman Jurisprudence.[1] Lasselle,[2] on the otherhand, ascribed the rise of testaments to the peculiar psychological and religious concept of the immortality of the will entertained by the Romans (after they emerged from their primitive religious beliefs), and symbolised in the myth of the God Lar, which inclined them to carry out the deceased's wishes regarding his property. Its absence from the later Germanic world he explained by his theory of religious and philosophic

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[1] *i.e.*, Schelling, Hegel and Herbart and their followers. The Herbartians form a special class by themselves, and are of less consequence. The followers of Schelling have been separately known as the

Gans.

Karl Marx.

Lassalle.

Organic School The Hegelians belong to the Metaphysical School proper.

[1] Das Erbrecht pub. 1835.

[2] System der erworbene rechte pub 1861; See in this connection Loria quoted in the Evolution of Law Series Vol. iii pp. 255-256.

evolution of thought by which men rose to the higher conception of the immortality of the *soul* (as opposed to the will) which is freed from the trammels of earthly desires after death (so that the deceased can retain no wishes or desires regarding disposition and distribution of his patrimony). Both these theories proceed along rigorous logical lines and have since been demolished by Sociological jurists. Loria, for instance, demonstrates that the evolution of law, including the law of testamentary and intestate inheritance, did not proceed along a steady and single path; but in every society a period of testamentary disposition was followed by a return to intestacy, and, then again, by a stage of free testation, and so on, like pendulum-swing, which can only he explained by material economic necessities and not by mere logical philosophy. Gans does not explain why the Germanic nations, in spite of their freedom, encouraged intestácy; and Lasselle, who explained it by reference to their higher philosophy of the *soul*, can not logically and philosophically account for their later acceptance of free testation except by the interposition of what he calls a national juristic error which was involved in their copying the Roman institution.

Their defects.

Revival of Law of Nature in the Metaphysical School.

As already explained above, the doctrine of Law of Nature entered a new phase and received a new meaning with the advent of the Metaphysical school of legal philosophy. It was now identified with the philosophy of positive law—with the eternal principles, themselves conceived apriori by our reason, which. by deductive application to concrete details, were supposed to be able to yield a full and throughgoing explanation (the underlying rationale) of all rules of positive law and of their historic evolution in the world of experience. The different branches of this school, however, did not enunciate the same set of principles or ideals and their results were based on different conceptions of the nature and object of law and society.

The Hegelians

The Hegelians, who stood in the central line of descent from Kant in the direction of idealistic rationalism along Fichte and Hegel, based their dialectics on the norm or principle of liberty. Law (positive law), in its various phases was the progressive objective realisation of the eternal idea or principle of liberty of each individual (will) consistently with that of the other individuals This was the formal theory of Kant, transformed by the Hegelian doctrine of evolution, but proceeding, for practical purposes, in spite of the synthetic dialectics, on the same assumption of the mechanical conception of society. It is true that Hegel conceived the State as a corporate unit, in which the individual members were merged so as to lose all independent existence;

Mechanical conception of society.

but that was more as an ideal than as a reality, meant as a description of the stage, when, by the final fruition of the cosmic evolutionary process, the individual wills and the "general will," will be thoroughly identified in true moral freedom. For ordinary purposes, the Hegelians assume the individual as the unit whose will has to gain freedom through its harmony with the general will.[1] An interesting illustration of the use made of the familiar Hegelian dialectics for the elaboration of Natural Law from the fundamental principle of liberty or autonomy of individual will in English juristic literature is to be found in Prof. Lorimer's "Institutes of Law.[2] You may gather from it some idea as to the attitude and mode of the Metaphysical School of Law (the Hegelians) in dealing with Law of Nature in this period.

Revival of Law of Nature in the Organic school.

Krause.

As a disciple (in fact) of Hegel and Fichte, and a follower (in principle) of Schelling, Krause was, like his masters, a philosopher of "identity;" *i.e.*, identity of being and thought, subject and object, and of God and the universe. He accepts God as known by faith and conscience, but denies the personality of God, in the ordinary sense of the term, as it implies limitation. God is, as pure reason, an all inclusive,

God.

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[1] Kant supposed the limitation of individual wills to arise out of the opposition of other individual wills. Hegel look it as due to the opposition of the general will · see Korkunov p. 106.

[2] I have discussed this work in a later lecture.

The world.

The final end of the world process and law.

pervasive essence or substance (‘ wesen ’) which contains the universe within itself. The world is conceived, like Schelling, as a divine organism, and humanity as its highest component. The world process is one of universal organic development, through formation of higher and higher organic unities (here also Schelling’s theory is adopted), till the world reaches the most perfect unity and is identified with God in pure reason which is also absolute liberty. Right or perfect law (Law of Nature) is the *form* of this development—the mode or rationale of all progress to the highest unity *i.e.* identification with God or the absolute universal reason. This identification, which is the highest reality (realisation of reason) and highest liberty, is brought about by the reality (realisation) of the ideal humanity,—*i.e.*, an ideal universal society of men, grown out of a gradually widening organic process or operation which first combines individuals to form small groups, and then larger groups till it covers mankind as a whole. The differences between man and man disappear as the inherent identity predominates in an ever increasing degree in course of the organic development according to the law ; and in the final unity so reached, man is merged in God. God is the reality which thus transcends as well as includes nature as well as humanity ; and the Law of Nature which is the law of the world process is dynamic. It leads to progress and is also the safeguard of all progress. Krause's conception of the individual man as a real personality, (*i.e.*, an organic unit partaking of the reality of the original substance or God, and not as a mere item in the passing phases, phenomena or attributes of the unchangeable all pervading essence), his theory of God as reachable by faith and conscience,—as simultaneously transcendent as well as immanent in the universe,—together with his doctrine of identity of the two (God and universe) mark out the contrast between his "Panentheism" which is a combination of Theism and Pantheism, and (a) Spinoza's pantheism,[1] (b) Schelling's philosophy of identity, and (c) the Jewish Christian conception of God (theism) taken separately. The individual has in him the divine substance, and has a destiny and mission for which he must strive—that of union with God, the realisation of the one 'good in reason' by recognising and enforcing the Law of Nature. The same is true also of the society. The individual as well as the society are moved towards this destiny by conscience, which is the "longing of love" and the great index of the Law of Nature. Law is thus a condition of morality and correlated with it for the same end or ideal of "the good." The objective relation of life which is in accord with the ideal is right; and Law establishes that right. The one and final ideal of reason is sub-divided into many types, *e.g.*, wisdom, religion, love, art, &c., the efficient means of attaining them, *e.g.*, and personal freedom, health, &c., and property. To each of these types there is a corresponding natural right, *i.e.*, a relation of life which puts a man in the position of reaching these ideals; and Law, in establishing these rights, has to be clothed with authority, *i.e.*, right of coercion, supervision and correction of individuals. Humanity, with these rights established by Law for the attainment of these ideals, becomes the State. The State and the Law are thus both organic in nature, developing spontaneously for a type or ideal.

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[1] For Spinozas' doctrine see Lecture II.

Law and the State.

The points of departure of the Organic school.

Krause opposed the formalism of Kant and the Hegelians, their mechanical conception of the society, and their view of law as directing and delimiting individual wills. He held that in social, as in organic, life all the phenomena are dependent on one another and are reciprocally conditioned. He, however, proceeds according to the philosophical method, *i.e.*, deductively from the conception of pure reason; and herein is his difference from the empirical or scientific organic school. Law is a postulate of reason by which the society, as an organic unit, establishes an objective atmosphere of reason so that it may rise superior to and control the forces of external nature as well as the wayward activities of the individual will This Organic idea of Schelling and Krause and its application to law and morals received further development in the hands of Ahrens, Roder and others in the later half of the 19th century and constituted the metaphysical accompaniment or complement of the sociological conceptions that were fast developing in that period.

It is interesting to note the marked similarity of the positions respectively reached by the Historical and Metaphysical Schools of German Jurisprudence at the end of the first half of the 19th century. Krause and Puchta were contemporaneously departing from the individualistic standpoints of their masters and predecessors in their respective schools; and this was quite in keeping with the then developing phases of sociological and economic thought. What was given as historical truths with regard to nations and peoples as units by the ‘Historical School’ was offered as universal truths of world evolution by the Metaphysical Schools. I have grouped together in one Lecture the Historical and Metaphysical Schools prevalent in Germany in the 1st half of the 19th century because of their close association and many marked similarities. The influence of Schelling's and Hegel's philosophy (as well as of Kant's) on the Historical School was immense due to an intrinsic sympathy between them.[1] Their respective characteristics have been ably summarised by Prof. Roscoe Pound and they may be compared and contrasted with profit. Speaking of the characteristics of the Historical School Prof. Pound observes[2] :—

Characteristics of the Historical School.

1. They consider the past rather than the present of law.
2. They regard the law as something that is not and in the long run can not be made consciously.
3. They see chiefly the social pressure behind legal rules. To them sanction is to be found in habits of obedience,[3] displeasure of one's fellowmen,[4] public sentiment or opinion,[5] or the social standard of justice.[6]
4. Their type of law is custom or those customary modes of decision which make up a body of juristic tradition or of case law.

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[1] See Erdmann's History of Philosophy (Hough's Translation), Vol iii, p 328.

[2] Scope and purpose of Sociological Jurisprudence, 24 Har. L Review, p 599.

[3] Maine's International Law Lec. II, Westlake's International Law Lec I, 7.

[4] Clark's Practical Jurisprudence, p. 134.

[5] Rivier—Principles de droit des geno I, 7, Lightwood—The Nature of Positive Law p p. 262, 389

[6] Carter—The ideal and the actual in law, p 10,

5. As a rule their philosophical views have been Hegelian partly because the school aròse when Hegel's influence was paramount, but partly also because of an intrinsic sympathy.

Ditto of the Philosphical School.

Similarly with reference to the philosophical school he remarks[1] that they—

1. "Are more apt to consider the ideal future of law than its past or present.
2. While agreeing with the historical jurist that law is not made, but found, yet in general believe that when found, its principles may, and as a matter of expediency, should be stated definitely and in certain form.
3. Look at the ethical and moral bases of rules rather than at their sanction.
4. Have no necessary preference for any particular form of law (case law or statute law)
5. Hold very diverse philosophical views so that in a way there is not so much a philosophical school as a group of philosophical schools.

Defects of both.

These two schools acted and reacted on each other. Hegel's philosophy became the philosophy of, and for, the professional class,[1] came into vogue in the English universities and contributed towards "the prevalence in American juristic thinking of the doctrine preached by the German Historical School hostile to legislation—the agency of social progress in modern democracies."[2]

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[1] *Ibid.*, p. 606.

Defects of both

The sociological objection to these schools, their methods and theories, will be discussed hereafter. It will suffice for the present only to note that the philosophy of law, (*i.e.*, the conclusions as to the nature of law and right) built up by the Historical School by historical deduction from the Roman sources, from Germanic legal institutions, and from the juristic development based thereon, was in fact a new Natural Law eternal and inexorable, and changing, if at all, along fixed lines. In America (the United States) the basis of all deduction has been instead the classical Common Law—the English decisions and authorities of the 17th, 18th and the first-half of the 19th centuries. In either case the old fund of legal principles (of Roman and German laws and customs in one case, and the English Common Law and case law in the other) are presumed to contain the perfection and quintessence of legal wisdom—the very Nature.—

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[1] Roscoe Pound—*ibid*, p. 600 cites Talbot—The dualism of fact and idea in its social applications (1910).

[2] *Ibid*

Recht of the older philosophical schools—based on historical premises. The Metaphysical School was guilty of an overstrained idealism and its attempt to explain law, its nature, origin and development, in fact, everything by Metaphysics and dialectics soon lost popular confidence, and was subjected to popular contempt especially in England and America.

LECTURE IV.

THE EMPIRICAL THEORIES IN THE FIRST HALF OF THE 19TH CENTURY.

The Analytical Theory.

Juristic theories of the 17th and 18th centuries

IN the 17th and 18th centuries the juristic theories were all more or less under the domination of the doctrine of Natural Law. Natural Law was not the exclusive property of the Rationalists like Puffendrof or Wolff, but even professed empiricists like Hobbes and Locke were its exponents. If Kant be taken to have introduced criticism for the elimination of error from the dogmatic rationalism of his predecessors, Hume may be regarded to have performed a similar function with regard to the dogmatic empiricism prevalent before his time. The habit of uncritical assumption—the assumption of a prehistoric state of nature and the eternal unchanging law of nature prior to the formation of the State and Positive Law—was so strong that no philosopher or jurist, to whatever school he might belong, and however emphatic his assertion against the legitimacy of conclusions based otherwise than on facts of experience, could escape from it.

The dogm tism of La of Nature.

Another assumption, equally universal in these days and a direct accompaniment of the above, was that of the Social Compact, thrown out as an explanation of the origin of the State and Positive Law. Thinkers and jurists, even of opposite camps, subscribed to the theory; and however different or even inconsistent and antagonistic their positions might be with regard to the parties, the terms, and the nature of the contract, they were at one in supposing that the State or sovereign was voluntarily set up, by the individuals, with power and authority to rule and control them; and that the organisation of the society was the result of individual wills.

Arbitrary formation of Law

As a corollary to the theory of social compact and doctrine of savereignty we get also the current opinion, held equally by the jurists of all schools, that Positive Law is the outcome of the sovereign authority—an arbitrary formation of the will of the sovereign legitimised by the authority conferred on him by the social compact. So long as the compact and the social organisation based on it remained in tact, the law imposed on the people (hence called Positive) by the will of the sovereign was, from the point of view of jurisprudence, valid and binding on the people, however morally unjust and inequitable it might be.

Relation of Law of Nature and Positive Law.

The relation of Law of Nature and Positive Law, as understood in the light of these theories, was one of cause and effect as well as of coexistence. Nature, in the first instance, gave

Social Compact.

rise to the State organisation and sovereignty and Positive Law. Human nature impelled men to form, by contract, the civil society for the more effectual realisation of the eternal principles of Natural Law by means of the concrete rules of positive law framed after its pattern and the enforcement of the latter in the society under the authority and sanction of the State. Nature prompted the social contract, and, Law of Nature made the contract inviolable, and the positive law was the ultimate product. The Natural Law, however, does not thereby become *functus officio*, but continues to exist side by side with Positive law, as the test or criterion of its merit or justice—as the condition or limitation of the sovereign's will in the creation of the rules of Positive Law. Positive justice is to be tested by Natural Justice; and where they differ, attempt should be made (jurists, however, entertain widely divergent views regarding the legitimate direction and intensity and proper occasions of such attempts) to bring about their coincidence by the reform of the former.

These political and legal ideas were products of individualism

You have been already told how all the above phases of political and legal thought in the 17th and 18th centuries were products of historical development of individualism in the European Societies. Individualism at first sought protection, under the ægis of the secular state, from the overexpanded and excessive domination of the church over individual freedom of action and thought; and the authority of the secular state or sovereign was accordingly based on the same unassailable warrant of God or Nature and the eternal Law of Nature which was claimed by the church as the justification and foundation of its dispensations. In fact, the theory of Social Compact was set up as an additional support—that of delegation of the sovereignty of the people to the secular king by the people themselves. This placed the king in a position of advantage over the church, and vested him with an additional title which the church did not possess, and at the same time reconciled the legal and political subjection of the individual with his spirit and ideal of individualism and free self-determination. The doctrine of arbitrary formation of Positive Law had therefore universal acceptance at that time in legal theory; and had, besides, the sanction of the classical jurisprudence of Rome and of the time honoured popular sentiment that had gathered round the absolute sovereignty of the Roman Emperor and, transmitted through the middle ages, still lingered in favour of their lesser prototypes in Western Europe.[1]

All arose out of the spirit of individua-

The Law of Nature as well as the Social Compact came afterwards to be turned against lism in European societies and were used first to set up the secular state in opposition to the church and, next, to set limitations against the autocracy of secular kings.

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[1] The church at one time claimed secular authority under a charter of the Roman Emperor. This fact, however, was not substantiated and it came afterwards to be discredited altogether.

the autocracy of the secular kings. They were supposed to set limitations to the arbitrary exercise of the regal authority and present philosophical and social ideals and standards to the king and the legislature for the making of the law. The current idea that positive law was the creation of the will of the law-giver was, however, not disputed even by the foremost exponents of individual liberty of either school (Philosophical or Empirical) of Jurisprudence. Neither Puffendorf, Thomasius, Leibnitz, Wolff and Kant, nor Locke and Rousseau questioned the origin of positive law in the mandates of the king and the legislature, as preached by Hobbes, nor its claim to obligatory character on that ground. Their only difference on this point consisted in the extremists among them (*e.g.*, Rousseau) repudiating this obligatory character of positive law when it happened to be inconsistent with the Law of Nature and the natural rights of individuals,[1] and in conceiving the individual legislators or Kings as the mouth pieces of the society as a whole.

Main corollaries of the Imperative or arbitrary theory of Law.

In its more orthodox form the doctrine of the arbitrary formation of law regards law as emanating from the sovereign or persons holding delegated authority from him. It does not matter whether the sovereign be one individual or a body of men representing the state. Deriving, as it did, its origin, in the modern era, from the political theory, *i.e.* the theory of the voluntary creation of the state organisation by the people (social compact) and the (individualistic) mechanical conception of the society, this doctrine developed itself most steadily in the congenial soil of England and America and held fast even after the theory of Law of Nature (in its cruder forms) and the social compact had come to be discredited in intellectual circles as scientific or historic truths. We have seen (Lecture II) that Hobbes, in the 17th century, for the first time outlined this doctrine in England with great clearness and force. From this point of view, Law becomes a creation of the State,—the sum total of its legislation (director indirect). There can therefore be no Law where there is no State; none, inside the State, which is based on mere popular usage or custom, but not accepted, recognised and sanctioned by the sovereign or the state through its accredited organs; nor any, that is capable of operation beyond the limits of the territories or jurisdiction of the state, (*e.g.*, rules of international law).

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[1] *Vide* Korkunov Theory of Law, p. 131

Law as a co-ercive norm.

The idea of Law as a co-ercive norm, as one necessarily supported by co-ercive sanction proceeding from the law giver, is a suitable corollary to the theory of its arbitrary formation. The Formal School of Kant, in opposing Law and Morals as rules respectively meant for the regulation of the outer and inner life of man, emphasised this distinction by pointing out that while the rules of morality, relating to the inner will of man, admitted of no constraint, but demanded voluntary submission, rules of law were those which might and would be enforced by constraint on individuals, unwilling to abide by them, in their external conduct and relations in society. The coercive sanction or constraint, which is, according to this theory, a necessary accompaniment of Law, is some material, physical constraint in the shape of some external evil.[1] This coercive view of Law was also commonly accepted by the different schools of legal philosophy. Those who held the dualistic conception of the universe (the Cartesians), and rigorously separated the regions of mind and matter without any possibility of mutual intraction between them, naturally emphasised the necessity of external constraint (as opposed to any mere psychic influence operating pursuasively on the mind) as the only appropriate adjunct of law[2]. The realists (Hobbes, Locke, &c.) repudiated 'innate ideas' and, leaning towards extreme materialism, would know no force or influence which can not appeal to experience;[3] and hence the two schools were agreed as to the coercive character

The Schools on the coercive character of Law of law and the objective nature of the constraint exercised by its sanction.

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[1] *Vide* Korkunov—Theory of law, p. 131.

[2] See its criticism by Korkunov—Theory Law, p. 94.

[3] *i e.*, the physical experience of the senses as pleasure and pain.

Political theory of the state and mechanical conception of society

I told you, a little while ago, that the doctrine of positive law as a voluntary creation of the human will, *i.e.*, of the sovereign, who has been placed at the head of the society for its regulation, is founded on the political theory of the organisation of the state and the mechanical conception of the society. Before the rise of the German Historical School and the Organic theory of Schelling, these theories were accepted or assumed by diverse schools of legal thinkers. In fact, they were necessary and suitable concomitants of the then prevalent doctrines of Law of Nature and Social Compact. In the state of Nature, before the rise of human institutions, the individuals are supposed to have been isolated units—so many cells or centres of force—free to apply themselves in any way they liked, and owing obedience to none, and equal to each other. The individuals freely willing, according to their natural desire to herd together, formed the society. The society is thus conceived as a voluntary creation of of the wills of the individuals by which they placed themselves in juxtaposition, if not like stones put together in a heap, as a cluster of force units mechanically operating with reference to each other in a system of forces. Society was thus an automatic machine worked by the different individual forces operating together. For the better working of this social machinery an adjustment of parts or organisation is next given to it (and this also voluntarily, by the individuals), by which the individual wills or forces are made to converge towards a centre and thus subordinate themselves to a common superior like the planets in a solar system. Even the phenomena of life were, in those days, likened to the operations of a machine acting automatically under the laws of mechanics. Mind and matter were by some (*e.g.*, the Cartesians) supposed to constitute two essentially different substances incapable of causally influencing each other; and their apparent interaction, *i.e.*, the coordination and correspondence of their respective phenomena, was explained as a mere coincidence and concurrence (like the movements of two clocks keeping time in unison) under divine guidance or pre-established harmony. Others (materialists) reduced everything to matter working under the mechanical forces of nature. In either view the operation of any force (organic or psychic), regarded as essentially different from the mechanical, in the creation, growth, and activities of living beings--of individuals or societies—was not yet admitted or recognised; and what were called organisms were understood, in those days, as mere automatic machines, worked by similar forces, only generated, not, as in other machines, outside

Supported by both rationalists and materialists.

themselves, but from within their own constitution and structure. Such a mechanical conception of the individual and society precluded all idea of growth or organic development, either in the life of one individual or a generation of individuals or through successions of generations. Growth itself was not differentiated from mechanical additions like raising a wall or patching up a cloak. The doctrinairs of the Rational school supposed that men were all born with a fund of innate ideas independent of experience, and this stock of innate ideas was incapable of variation. A man may add to his knowledge by education and experience in his lifetime; but this newly introduced fund of acquired capacities and powers and ideas are necessarily lost with his death, by the dissolution of the body by which they were acquired, and could not be transmitted to the next generation. This was quite in accord with the dualism of the Cartesians which separated mind and matter (body) so completely that no influence could be communicated between them so as to affect one another. The empiricists, who resolved everything to the data of experience, went even further. They denied even the small fund of innate ideas conceded by the rationalists; and every individual and generation of individuals must, according to them, begin with a blank sheet (or tabula-rasa) with no mental ideas or equipments

Confusion of growth and mechanical addition enriched by inheritance from the civilisation and knowledge of the past generations. Social life was thus regarded not as a product of successive growth or development, but as an arbitrary artificial combination voluntarily brought about by the wills of the several individuals agreeing to form a mechanical cluster, for the sake of security and order, and for an effectual combined attempt to control the external forces of nature. Thus the prevalent philosophical doctrines (rationalism and materialism) and psychological theories (doctrine of innate ideas and sensationalism) equally supported the individualistic mechanical conception of society, the political theory of the state, and the doctrine of arbitrary formation and co-ercive nature of Law.

the common juristic theories of these days.

As already observed, dogmatic rationalism was shaken to its foundation by the penetrating criticism of Kant; and Law of Nature was identified with reason—absolutely pure and colourless, and free from all assumptions with regard to any inherent craving of human nature for any material good. The investigations of Montesquieu, Herder, Vico, and of the German Historical School, from the point of view of concrete history, and of Kant and his followers of the philosophical school, from that of logical possibility and consistency, thoroughly disproved and discredited the social compact and its terms as an event or issue of fact; and they

Subsequently abandoned and remodelled diversely by different theorists.

severally sought to build up independent theories as to the nature and origin of the institutions of the State and Law as involuntary and spontaneous issues or expressions either of the popular spirit, or individual reason, or of the universal "absolute"; this last again regarded either as 'thought,' or as 'will,' or as the unconscious prius of both the Ego or Non Ego, *i.e.*, of the universal Spirit and Nature.

The resulting confusion.

It was at this stage that the practically inclined intellects of England came to distrust the Philosophical and Historical Schools and their methods (on account of their extravagant claims and misdirected efforts to make either apriori dialecties of pure reason or speculative enquiries into bygone periods to do the whole work of legal science) and leant towards the Analytical method for the building up of the science of Jurisprudence.

Procedure adopted in England: the Analytical method.

Eschewing surmises and metaphysical enquiries as to the remotest prehistoric beginnings of things and institutions, or their modes of future historic development, they confined themselves to the study and analysis of the existing social structures and organisations and the legal systems of the civilised societies of their age, and of societies which (like the Roman Republic or Empire), from their accounts guaranteed by history, could be regarded as equally advanced as their own, for purposes (of inductive generalisation) of the legal science. The Analytical method has been described, by Gray, Berolzheimer, Bergbohm and others, as resting on "the comparative study of the purposes, methods and ideas common to developed systems of law by analysis of such systems and of their doctrines and institutions in their matured forms"[1]. It is true that this method was not unknown to the ancients, for it must have been the basis on which the early beginnings of the Roman legal science in Jus Gentum were founded in the early republic, and furnished the scientific ground work of analysis and comparison and generalisation which supplied the raw materials of the legal science which afterwards were glorified into the Equity Jurisprudence of Rome under the inspiration of the philosophical theory imported from Greece. In the Elizabethian era the same procedure of analysis—'the putting of differences and taking of diversities'—was adopted in England for the sake of founding juristic principles and conceptions and their application in concrete cases, for the amelioration of Law by case law and Equity. But both in Rome and in England the method was directed more towards the practical question of administration of justice, and only indirectly towards the cause of the science. It was in England, in the first half of the 19th century, that Austin laid the foundation of Analytical jurisprudence

Its use in the Roman and Elizabethian periods.

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[1] Roscoe Pound—Scope and purpose of Sociological Jurisprudence—Har. L. Review Vol. 24, p. 594.

and adopted the Analytical method professedly for the building up of the science of the first principles of law. Professor Roscoe Pound points out that, as a method of Jurisprudence, this method requires a condition of stability in the legal systems analysed; for, at the stage of fluidity of law, for instance, in the stage of shifting and growing customs, of societies not yet sufficiently organised and cemented by a thoroughly centralised and powerful Government, the conditions are too unstable to admit of their analysis, and the difficulty is similar to that of Chemistry in dealing with unstable compounds. It is accordingly appropriate to a developed system only; to a system which has matured and become stable and whose changes are slow, definite and deliberate and can be followed and explained with precision and accuracy by tracing them to their appropriate causes.

The conditions of the Analytical method.

One staring characteristic of such societies and systems is that the chief instrument of law—making and introducing legal changes, is legislation. They have a highly evolved social organisation, an all powerful centralised ruling authority, legislative, administrative, and executive, backed by a force which is almost omnipotent for purposes of internal control. The method of analysis confined to such societies naturally leads to the imperative or positive theory of Law, *i.e.*, of Law as something

The imperative theory of Law.

made by the arbitrary will or command, according to different versions, either of the sovereign, or the state, or the society, and expressed through the legislature, or the courts. This regards Law not as a spontaneously generated and evolving product of social life but as a voluntary creation of conscious and increasingly determinate human will.

Roscoe's summary of the Analytical School.

Prof. Roscoe Pound,[1] thus summarises the characteristics of the Analytical School :—

1. "They consider developed systems only.
2. They regard the law as something made consciously by law givers, legislative or judicial
3. They see chiefly the force and constraint behind legal rules. To them the sanction of law is enforcement by the judicial organs of the state ; and nothing that lacks in enforcing agency is law.
4. For them the typical law is Statute. But the backwardness of legislative law-making in America is reflected in a position taken by American jurists whose point of view is otherwise analytical which, with respect

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[1] *Vide* his monograph on the Scope and purpose of Sociological Jurisprudence, 24 Har L Review, p. 595.

to legislation, is superficially akin to that of the Historical School.

5. Their philosophical views are usually utilitarian or teolelogical."

I may supplement this by adding (what is implied in the 1st of the above characteristics) that the Analytical method, as sketched by Austin, is expository ; *i.e.*, it confines itself to the study and definition of Law as it is, instead of directing itself to what it was or what it should be, and rigorously separates or delimits the provinces of Jurisprudence and the other social sciences like history, sociology or politics or the art of legislation ; and further that it interests itself more with the analysis and definition of the form of the law than with its contents and their evolution, its purposes, or ideals.

Hobbes and Austin.

Hobbes (1588—1679) had lent the principal ideas and the substantive theory of utility to the Analytical legal science founded in England by Austin. Hobbes, inspite of his independent attitude and professed scientific and empirical stand point and method, had his share in the speculations as to the Law of Nature and Social Contract ; and that was inevitable in the age in which he lived. Austin (1791—1859), following Bentham (1748—1832) in this respect as also in his utilitarianism and theory of law, scrupulously shuns these speculations, and, in

The implications of positive law

fact, takes elaborate pains to refute them.[1] He maintained that the only appropriate subject of Jurisprudence is Positive Law, *i.e.*, " the law established (" Positum ") in an independent political community by the express or tacit authority of its sovereign or supreme government." He describes Positive Law as " consisting of commands set, as general rules of conduct, by a sovereign to a member or members of the independent political society wherein the author of the law is supreme"[2] and thus distinguishes it from the laws properly or improperly so called, *e.g.*, Law of Nature (physical and moral), Law of God, Law of Morality, &c., which are not Positive Law but objects related to it only by resemblance or analogy. 'Command' implies, according to Austin, a superior from whom the command issues; an inferior who is directed by the command to a course of conduct; a sanction or evil with which the superior, backed by his force, threatens to visit the inferior in case of disobedience; and the consequent duty, liability, or obligation, on penalty of the sanction, on the part of the inferior to obey the command. This was essentially the Roman view of Law as also the view commonly held by jurists in England and Scotland.[3]

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[1] Austin's Jurisprudence.

[2] See Campbell's Introduction to Austin's Jurisprudence.

Erskin's Principles of the Law of Scotland, (1754) International Law.

According to the above view International Law would not be Positive law and it is accordingly excluded from Jurisprudence. It would be, according to Austin, in fact international morality, consisting of rules of conduct, established by usage, for independent states and imposed and sanctioned not by any common political superior, but by general opinion of the peoples and states concerned.

Jurisprudence particular and general.

Jurisprudence is thus, according to the Analytical theory of Law, essentially an aposteriori, empirical science and is divided by Austin into particular (or national) and general, according as it is limited to the consideration of the positive laws of any particular community or based on a comparison and generalisation of principles, notions and distinctions common to the ample and mature legal systems of the civilised communities. It is this general Jurisprudence which is the science or Philosophy of Positive Law.

Leading notions.

Austin next analyses certain leading notions which pervade every system of Positive Law; *e.g.* '*persons*' as those upon whom or for whose benefit laws are imposed; *things acts or forbearances* as the matter with which laws are conversant, or, as more clearly explained by Holland, the object and subject matter respectively of rights; ***motive, will, intention*** (with their negative phases commonly included in the term "***negligence***") which lay behind all juristic acts and constitute the main springs on which laws exercise their influence for stimulating or preventing human action as devised by them; and lastly, *right* the creature of law, and *injury or wrong* which results from its infringement.

Judicial legislation.

Law, according to Austin, is either set by the sovereign immediately, or by others by the delegation or permission of the sovereign; and either in the proper or direct mode of legislation, or, indirectly, by judicial decisions. He thus supports the theory that the judges can *make* laws as well as administer them; and this power of indirect legislation is part of the sovereign authority delegated to them by virtue of their office. Austin pronounces the view of the Analytical school with regard to the exact position of custom and customary law in jurisprudence with great force and precision. Custom is not itself law nor are persons among whom the custom prevails the sources or authors of law. It is only when the custom is accepted and enforced as law by judicial decisions that it becomes part of the positive law of the land and may be called customary law. "Jus moribus constitutum" (customary law of the Roman lawyers) is therefore misleading, for it may involve the misconception that custom constitutes a different species of law altogether, having *suo motu* the authority or force of law even without the

Custom and Customary Law

support of the sovereign's command or sanction. The expression may be justified only in the sense of law fashioned (by judicial decision) upon pre-existing custom. This theory divides the life history of a custom into two stages—firstly, of custom as a rule of morality imposed and enforced by popular opinion; and, next, of customary law, when, by its recognition and enforcement by the sovereign through the court of justice, it is positivised into law. When a custom is adopted as law by legislation it becomes part of the Statute Law of the land (written law or *Jus scriptum*) and is no longer called customary law by the Roman lawyers. Custom legalised indirectly by case law alone properly comes under the head of "Jus moribus constitutum." The "Jus Prudentibus Compositum" of the Roman lawyers, wrongly imagined to obtain as law by the authority of private lawyers, is likewise really fashioned and made into law by judicial decision upon opinions and practices of the learned jurists and lawyers.

Austin's formal theory or definition of Law

Austin's conception of law as a command of the sovereign thus tallies with the current view in the 17th and 18th centuries and it has been described as the formal theory of law. No doubt it represents his theory as to the form of the law, that is, the characteristics by which positive law is to be distinguished, by its form, from other rules of human conduct:

and does not, by itself, indicate his views as to the contents, purposes and ideals of positive law. It is however inaccurate to speak of Austin as a purely formal jurist, for he had really a theory of law which, following in the lines of Hobbes, Bentham, Hartley and others, was utilitarian; and he took considerable pains to establish this theory of utility against the opposite one of "moral sense or instinct." Positive Laws should be framed and fashioned on the principle of utility, so as to give effect to the laws of God. The divine and perfect moral laws (Laws of Nature) are established by God's will or command. Some of them are expressly revealed in God's words or commandments; but those that are unrevealed have to be gathered by the *light of nature.* According to the theory of *moral sense*, which is often otherwise expressed as *innate practical principle*, *practical reason*, *conscience*, *or common sense*, &c. this light of nature is derived from universal sentiments by which the moral quality of actions is judged alike by all men spontaneously, instantly, and inevitably. Those sentiments are not the slow products of human reason, which is fallible, but are the intuitive unerring feelings of the moral sense, which, like our external senses, has been implanted in man for the discrimination of right and wrong and the determination of his proper duties as marked out and willed by God. Austin points out however, firstly,

The theory of utility.

Laws of God or Nature.

Refutation of the theory of moral sense.

that our moral judgments, passed on the rectitude or depravity of human actions, are, in numberless cases, neither immediate nor involuntary, but slow and hesitating, and often fail altogether to determine whether a particular action is praiseworthy or blameable: and next, that the judgments, that are in fact prompt and involuntary, are often factitious, begotten in the way of association by our past experiences of its results, and in no way proofs of a moral sense. Such prompt judgment may as well arise from a perception of utility. Moreover, the assertion of the theorists of moral sense that the moral sentiments or feelings aroused by the contemplation of human actions are precisely alike with all men is groundless and contradicted by notorious facts. It is in respect of only a few classes of actions, with regard to which the dictates of utility are the same at all times and places and are also so obvious that they hardly admit of mistake or doubt, that there is indeed a general resemblance of moral opinion or sentiment; and this accounts for a general resemblance, with infinite variety, in the systems of law and morality which have actually obtained in the world. Those who, like Bishop Butler, adopt an intermediate view that our moral sense and utility are both indices to the tacit commands of the deity, the former with regard to actions which all men universally appraise alike and

Utility and not moral sense is the true index of Laws of God or Nature.

the latter in other cases, are also wrong; for it is hardly possible to indicate a single class of actions in which the moral judgments of all men have absolutely been the same.

The theory of utility.

Canons of utility.

The theory of utility, on the other hand, is based on the assumed goodness of God. God, in his unlimited and impartial benevolence, designs the happiness of all his sentient creatures. Human actions which forward that beneficent purpose are enjoined by God, and those which are adverse to that purpose are forbidden as mischievous or pernicious. The will of God wilth regard to the human actions has accordingly to be gathered from their tendencies or utility—their conducivences or otherwise towards the happiness of mankind, *i.e.*, the aggregate of human enjoyments. Following the line of reasoning adopted by Kant for deducing his celebrated rule of liberty, Austin lays down two canons to guide the reason in estimating the utility of human actions, *viz.*, (1) "The tendency of an action is the *whole* of its tendency: the sum of its probable consequences, the remote and collateral as well as the direct, in so far as they may influence the general happiness; and (2) in collecting or estimating this tendency we must not consider the action as if it were single and insulated, but must look at the class of actions to which it belongs. The question is this—"If acts of the class were generally done or generally forborne or omitted what would be the probable effect on the general happiness or good." God's commands would thus be mostly rules, *i.e.*, general or universal, relating to classes of actions instead of single isolated acts. An act is forbidden if *it* generally produces evil effects although in exceptional cases it may be conducive to utility. It is true that utility as the index to the tacit commands of God is imperfect, for our knowledge and calculation of utility may be wrong and lead us to mischief and sin; but in the absence of any other better guide (the moral sense being disproved) we must make the most of it with all its deficiencies. It is not true, as argued by the detracters of the Utilitarian theory, that it calls upon every man to shape his conduct with regard to each act by a calculation of its results which is impractical. What it in fact demands is that our rules would be fashioned on utility and our conduct on the rules so framed beforehand for our guidance. The objection of impracticability or delay is thus removed by the rules or maxims inferred from utility and lodged in the memory. Our conduct immediately conforming to the rules would be truly adjusted to utility if the rules themselves, which have been formed after mature consideration, had been in fact so adjusted. A moral sentiment will soon gather round these rules in consequence of their being believed to be

Refutation of objections to the theory.

in accordance with divine commands as indicated by utility, and our conduct will odinarily be immediately guided by the rules and the sentinent associated with them. Only in rare exceptional and anomalous cases, will a direct reference to the principle of general utility be necessary.

Individualistic or egoistic utilitarianism.

In elaborating this theory of utility, like Bentham, Austin distinctly discloses his individualistic position by explaining that by the general or public good he means the aggregate enjoyments of the individuals collectively referred to as a whole by the words "general" or "public."[1] It is the sum total of the good of these persons considered singly ; and the theory of utility demands that each shall ordinarily attend to his own rather than to the interests of others. The individual is the best judge of his own interests and the sum total of individual efforts each directed towards one's own good will most likely produce the highest general good. That this scheme is approved of God is proved by His constituting man with his self-regarding affections steadier and stronger than his social affections.

Recent objections to the theory.

The opponents of this crude utilitarianism accuse it of regarding man not as a cultural product, but as an automatic calculating machine, mechanically registering the advantages and disadvantages, pleasures and pains, of every action. It ignores the ethical impulses of human nature unaffected by utility and unrelated to perspective pleasure or pain. The human mind is a thinking organism and its motives are too complex and profound to be reduced to a simple formula.[1]

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[1] Austin—Students' edition, p. 53

Jus Gentium or Law of Nature.

Austin's pronouncements on Law of Nature are equally representative of the view of the Analytical school on that celebrated doctrine. The Roman Jurists divided Law into Law of Nature (Jus Gentium) and Jus Civile; and the modern jurists have similarly divided it into Law of Nature and Positive Law. After tracing the history of the formation and development, out of the political and commercial necessities in Rome, of the Jus Gentium or Jus Omnium Gentium, which was the law extending to all communities which formed part of the Roman empire (as opposed to the Jus Civile peculiar to the Romans themselves) by the edicts of the Praetor Peregrinus and the various provincial presidents and governors, he points out that this Jus Gentium was also, on account of its equality or universality, called Jus Aequum or Aequitas.[2] The evident superiority of this law over the Jus Civile due to the former being evolved in a more enlightened age and out of larger experience led to its gradual incorporation into the Jus Civile by legislation (Jus Praetorium, made up chiefly of the edicts of the Praetor Urbanus—which also came, for that reason, to be called Aequitas). Jus Praetorium, Equity, or Jus Gentium thus came to be regarded as being characterised by its utility, impartiality and fairness and its regard for the interests of the weak. It brought about many changes in Roman Law, *e.g.*, it enlarged the rights of women, gave to the filius familias rights against the father, and to the members of the subject states rights against the Roman citizens.

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[1] See Berolzheimer—Legal Philosophies, Art. 28, pp. 138-39

[2] Sir Henery Sumner Maine would rather derive this name from its simplicity and levelling tendency suggested by the Latin term "aequus" see Ancient Law—Ch iii, p. 59

In course of time, after Roman Law had incorporated and absorbed the Jus Gentium, and, tending in every direction to universality, put off much of its exclusive character, the Jus Gentium as a separate system, eventually disappeared. The office of the Praetor peregrinus fell into disuse; and Roman Law itself, thus enlarged and enriched, became applicable to civil questions arising between members of all communities under the aegis of Rome. The Positive Law of Rome (Jus Civile in the larger sense) came to include Jus Civile (in the narrower sense, consisting of the remnants of the old Jus Civile peculiar to Rome) and Jus Gentium (common to all nations) incorporated into it.

This distinction as understood by the early Roman jurists between Jus Gentium and Civile was practical. They were both departments of positive law and the name only indicated their respective historic origin and character. But the later classical jurists of Rome, who lived and wrote during the period intervening between the birth of Cicero (106 B.C.) and the reign or death of the Emperor Alexander Severus, introduced into their legal expositions speculative and philosophical notions, distinctions and principles borrowed from Greece, and supposed that the Jus Gentium, which represents that part of the positive law and morality of a nation which it shares in common with every other nation, did not, like the other part (corresponding to Jus Civile of Rome peculiar to that particular nation), derive its origin and authority from the community as its source or immediate author but was imposed by *natural reason.* In their writings, as well as in the compilations from them (The Digest) and the Institutes, made afterwards by Justinian, Jus Gentium was regarded as the natural or divinum jus imposed by Nature or God and known and recognised *naturali ratione* or by a moral sense or instinct. Austin characterises this distinction made between Jus Civile and Jus Gentium or Naturali by the later Roman jurists as merely speculative and barren of legal results, as that previously made

Law of Nature of the classical Roman jurists.

by the older jurists between Jus Civile and Jus Praetorium was pregnant with practical consequences. The only practical legal consequence deduced by the later jurists from their distinction of Law of Nature and Jus Civile was in respect of offences and crimes. The plea of ignorance was allowed in case of offences created by the positive law (Jus Civile) peculiar to a country or nation (*mala prohibita*), but not in offences which were *mala in se* which ought to have been instinctively known as against the Law of Nature.

These later Roman jurists, Austin points out, sometimes declared slavery as existing Juris Gentium or Naturali, meaning thereby that it was an institution recognised in common by all legal systems of the world; and, at other places, condemned it as repugnant to the Law of Nature. Thus they used the term ambiguously; sometimes as a part of the positive law common to all countries, and sometimes as the Divine Law which fixes a standard and ideal for the positive laws.

Its ambiguity.

Austin next turns to the doctrine of Natural Law as promulgated by Grotius and his successors of both schools. They take, as belonging to Law of Nature, those rules, legal or moral, which (on account of their obvious utility) are common to all human societies, including these that are not politically organised; and distinguish them from rules which are not

Law of Nature of the 17th and 18th centuries.

so common (as positive laws or moral rules) to all societies. These rules of Natural Law, they say, could not have been the result of induction from utility by the varying and fallible reasons of the law-givers of all countries but must have been copied by them from divine originals known to them through the moral instinct, or sense; (natural reason or universal practical reason) *i.e.*, through immediate consciousness. These universal rules of Nature are, therefore, not of human position or establishment, but perceived directly from the deity or the rational Nature which animates and directs the universe. Another derivatve conclusion sought from this doctrine is that positive laws, which are not so common to all mankind and do not therefore belong to Law of Nature, should be made to conform to the Law of Nature which is fixed by God or Nature as the standard or pattern for all laws. Austin accuses these writers of the same ambiguity which characterised the classical jurists, refutes their whole position by his arguments against the assumption of moral sense, and denounces these distinctions of Natural and Positive Law as useless for practical purposes.

Sovereignty.

Consistently with his whole legal theory, Austin defines sovereignty as chacterised by two marks—one, *i.e.*, internal sovereignty, indicated by the habit of obedience or submission of the bulk of the community to the sovereign or common political superior (consisting of one individual or a number of individuals), and the other, the external sovereignty, by the negative habit of non-obedience of the sovereign to any determinate superior. This fixes the sovereign, as well as the organisation, of all independent political communities and their classification. It logically follows that the power of the sovereign (governing body or individual) is incapable of legal limitation ; it may abrogate a law at pleasure, nor is it constrained to observe any law by any legal sanction. To hold otherwise would be to hold it in a state of subjection which is contra hypothesen. The violation, by the sovereign or by his successors, of a law made by him would be only a breach of positive morality (or a sin), but not of legal duty. He warns us, however, of the error of identifying, for the purposes of applying this principle of limitlessness of the sovereign's legal authority, the sovereign body itself with the foremost member of the sovereign body, *e.g.*, the king in a limited monarchy, who is sometimes popularly, but erroneously, styled as the monarch or sovereign. It is in connection with this topic that Austin laid down his celebrated juristic doctrine that the sovereign government has no legal rights against its own subjects just as it is under no legal duty or obligation towards them ; for right is not to be confused with might ; it arises out of a positive

The sovereign has no legal rights or duties law imposed by the sovereign, who is the common superior of the persons bound by it to certain duties as well as the others to whom these duties are advantageous. The sovereign enforces these duties by his sanction, supported by his might; and the right holder enforces them through the might of the sovereign. To speak of the sovereign as having legal right against his subjects would introduce a third person as a common superior to the sovereign and his subjects which is absurd. The legal duties of the subjects towards the sovereign are absolute, for there are no rights corresponding to them as in the cases of relative duties. Austin objects to the classification of rights into public and private; and his advocacy of the classification of law and right into that of persons and things being made the main basis of arrangement of the topics of jurisprudence also springs from his strict adherence to this fundamental analytical legal theory. It is to Austin that we owe the lucid and luminous analysis, familiar to all law students, of *status* on which the "Law of Persons" and its distinction from the 'Law of Things' are founded. Austin vigorously attacks the theory of consent or Social Compact as to the origin of political societies and sovereignties and lays it down to customs, to the unreasoning popular opinions and sentiments which he calls "prejudices" (like partiality or fondness

Absolute duties

Status.

Social compact.

Austin's theory of the state.

for a particular monarch, or race of kings or a form of government), as also to reason based upon the principle of utility. His explanation of the *permanence* of political governments is the same as that of their origin. Somehow or other the bulk of the natural society from which the political society was formed were desirous of escaping to a system or state of government from a state of nature or anarchy. That every government has arisen and continues through the consent of the people is true in this sense that their submission is a consequence of motives; *i.e.*, they *will* the submission which they render. It does not necessarily signify their approbation of the particular form of government; for it may be due to their fear of the evils of non-submission, or, probably, by a general perception of the utility of political government, that they freely submit to a government from which they are specially averse. Consent is not equivalent to promise. The duties (religious, legal, and moral) of the subjects towards the sovereign government and the duties (religious and moral but not legal) of the latter towards the former arise out of divine laws, positive laws and positive morality—recognised and obeyed through motives of fear, utility, custom, opinion, prejudices, &c.; and no ampler solution of their origin is necessary, requisite, or possible. The theorists of Social Compact purpose to base

Refutation of Social Compact.

these duties on promises (variously conceived), of the subjects towards each other agreeing to form and obey, *i.e.*, abide by, an organisation (pactum unionis) and determining the constitution or structure of the sovereign government (pactum constitutionis or ordinationis); and of the sovereign to govern to the paramount end (also variously conceived [1] by different writers) of the independent political society, and, specially, to govern to the subordinate ends (if any) signified by the resolution to form the society; the whole act constituting the *convention* or *pactum subjectionis.* Such an original covenant, even if existing, would not be legally binding, as it is prior to the positive law (which appears *after* the constitution of the state). Its obligatory character, according to Laws of God, depends upon the absolute end of the political organisation being in accord with the law of God; and, further, the sovereign will be bound by that law to govern to that end, and the subjects to obey his commands which are calculated to serve that end, even if there had been no exchange of promises at all. The original covenant, if it is consistent with that end, would be superfluous and therefore inoperative; if not, there would be no religious obligation on the sovereign to obey it. Similar arguments would apply if the obligation be moral. Moral obligation arises out of the bulk of the people uniformly favouring a course of conduct. Such uniformity is possible with regard to the absolute end of government (*i.e.*, the common weal) but hardly with regard to the subsidiary ends. Even if the people had somehow agreed as to some of the subsidiary ends settled at the beginning, it is scarcely possible that the succeeding generations should continue to hold the same ideas with regard to them; and to hold them bound by the declarations of their predecessors would be not only impossible but pernicious. The generation of men establishing a state may, for instance, regard foreign commerce as hurtful to domestic industry; but to hold, from this, that the society is for ever bound constitutionally by the original pact to put foreign commerce under a ban, even though the succeeding generations come to think differently, would be the most absurd of logical and political errors.

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[1] According to some it is advancement of true happiness, according to others it is the extension on the earth of the empire of right or justice. Student's Austin, pp. 128-29.

There is no historical evidence that the formation of any political society had actually been preceded by a proper original covenant. Such a covenant is moreover impossible; for it pre-supposes every member as capable of forming an intelligent notion of what he promises and is promised, and of appreciating its effects; as if every member were adult, of sane mind and much sagacity and judgment, and acquainted with political and ethical sciences. The whole theory is groundless and mythical.

Dr. Berolzheimer describes the English Analytical theories of Jurisprudence, of which Austin was the founder, as characterised by clearness and precision of thought; but remarks that they consider the fundamental questions of legal science rather than those of legal philosophy.

The Austinian theory of Law and Jurisprudence became the standard theory in England and America. In the latter half of the 19th century, however, some of the higher intellects of both countries, attracted by the phenomenal progress and success of historical enquiries and broader researches into the origin and development of law by the continental historical and comparative jurists, began to follow the historical method of the German Historical school and enquire into the earliest human institutions and laws of different countries and their successive phases of development, and make generalisations from the materials gathered by this historical and comparative process. What however distinguished the English Historical School[1] from the German was the marked analytical tendency cf the former and their supreme distaste and disregard for the philosophical and rationalistic leanings and assumptions which the latter, due to their kinship and association with the German philosophical schools, had to some extent carried with them in their researches and conclusions. The English Historical School was analytical and scientific (*i.e.*, objective), whereas the German school had been philosophical, in the application of their historical method to the investigation of Law and Jurisprudence. The omnipotence of the British Parliament in legislation naturally inclined them to favour the Imperative theory of Law and its development, in preference to the doctrines of Hugo and Savigny; but they found fault with some of the juristic ideas and notions of the pure Austinian theory. Their criticisms (and of others who imbibed the ideas of the Organic and Sociological schools, *e.g.*, the Neo-Austinians), as also the actual and possible replies of the Austinians, in support of some of the positions maintained by Austin may be summarised as follows:—

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[1] *e.g.*, Maine, Pollock, Bryce and others.

The English Historical School

(1) Austin's definition of Law may be true with regard to the laws of advanced civilized states like the Roman Empire or the modern European States where they are invariably enforced by the sanction of the sovereign power, *i.e.*, the might of the corporate society as a whole, through its accredited

Objections to the Austinian Theory

agents, but can scarcely apply to the more backward states, past and present, *e.g.*, the Oriental States, where the central power concerns itself only with the gathering of armies and levying of taxes and leaves the administration of law entirely to local courts and *panchayaets* supported by whatever local force or influence they can gather together in the shape of public opinion.[1]

(2) There are several classes of laws which, even in substance and much less in form, are not commands; and there is no sanction attached to them. They come under two heads:—

(a) declaratory laws, and those that only explain or repeal existing laws, and the laws of imperfect obligation; and

(b) those that do not impose duties, but are permissive or conferring of previleges; and also those which only fix the procedure, or rules of admissibility of evidence, or define jurisdiction.[1]

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[1] Maine—Early History of Institutions, Lec. xii, p. 364; Lec. xiii, p. 250. Bryce—Studies in history and jurisprudence, vol. i, p. 312; vol, ii pp. 44, 49 and 249; Walker—Science of International Law, pp 11-21; Pollock—First Book of Jurisprudence, p. 24.

(3) Many laws do not emanate from the sovereign at all but from subjects, *e.g.*, laws made by Judges; and indeed, in some cases, no definite human superior can be pointed out to whom they can be ascribed, *e.g.*, the customary law and Common law.[2]

(4) The Austinian analysis and definition of law is defective in as much as it disregards the ethical element in law, *i.e.*, the element of right and justice.[3]

(5) Austin's definition fails to emphasise and attach due importance to the other essential aspects of Law, *i.e.*, (a) its propriety, beneficence, and the value of its authority, which, more than the fear of the sanction, induce people to observe the law; (b) the organic character or unity subsisting between individual laws

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[1] Harrison—Fort. Review 1878. p. 684. Bryce cites the cases of administrative statutes enabling public bodies to do something, *e.g.* The Indian Railways Act or the Bengal Municipal Act. Salmond—Jurisprudence Art 17 at p 53.

[2] Jethro Brown—Austinian Theory of Law—p 27, Art 90 *et seq.*

[3] Salmond—Jurisprudence, p 51.

and the totality of the system (Law) of which they are the parts; and (c) its growth. In fact, the definition of Law as a command enforced by sanction, though technically correct so far as it goes, describes only the dry and repellent phase or aspect of the thing; while it ignores its real character and object as a warm and living organic entity, which makes for the highest good, expresses, for the time being, the highest ideals of our organised society, and lives and grows *naturally*; although, no doubt, it is susceptible to improvements effected under the authority and intelligent guidance of the conscious social will.

(6) The real source of Law as a totality is the State, and not the sovereign or any visible ruler who can at most be described as author of individual laws.

Most of the above criticisms are advanced by those who do not propose to break with Austin altogether. They do not wholly deny or controvert the essential truths of his definition or analysis, but hold that these truths do not cover the whole field and are defective even so far as they go. You know the familiar answers offered to some of the above criticisms by the upholders of the Imperative theory of Law. They urge, with reference to the first objection,[1] that the customary laws and rules of oriental states which mix up law, ethics and religion, and would never be enforced by the sovereign power (the might of the corporate society as a whole), even when they are habitually disobeyed, are not positive laws at all in the Austinian sense. They may be yet regarded as mere rules or laws of morality—defective and deformed predecessors of the more perfected type that constitutes the positive laws of the more civilised states. You may historically trace the new modern type to the older as its source, as you can biologically trace the descent of man from the anthropoid ape; but the two logically belong to essentially separate species with perfectly well cut differentias to distinguish them. The critics of Austin can not ignore this distinction between the two species—in fact, their point of attack rests upon it,—but would nevertheless call both "laws." This confounds logical with historical unity, and misunderstands the proper sphere of the logical definition of a particular class of rules of human action which Austin gave us.

Reply to the first objection

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[1] Holland—Jurisprudence, Ch IV. Markby—Elements of Law, Ch. I, pp. 7-8. Salmond—Jurisprudence, pp. 50-1

Reply to the second objection

With reference to the second objection, the familiar replies are the following:—(a) That these laws (at least some of them) are exceptions to the rule; they are either not commands at all, for want of sanction, or, at most, defective, as laws of insufficient obligation [1]. (b) That they may be quite legitimately regarded as laws in Austin's sense if we only give to the term 'sanction' a liberal and extended meaning so as to include "nullities." A law fixing procedure, or regulating stamps, or creating a jurisdiction, is a command which the party to a transaction or litigation must follow; for otherwise his act will be a nullity and his trouble and expense will be fruitless. Sanction includes not only positive but also negative penalty.[2] I may, in this connection, also observe that, in spite of Austin's 'positive dictum to the contrary, one may have good reason to accept the view supported by the weighty opinions of Locke, Bentham, Paley, Jhering, and others, of the modern jurists, and of Ulpian, of the classical age, that it is desirable to extend the meaning of 'sanction' so as to include

Sanction includes nullities.

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[1] Jethro Brown—Austinian Theory of Law—pp. 23-24, Art 76 *et seq.*

[2] Holland—Jurisprudence, Ch. VIII. Venogradoff—Common sense in Law, p 29. Jethro Brown—Austinian Theory, p. 9 note.—*c.f.* Salmond—Jurisprudence, p. 12. " A sanction is not necessarily a punishment or a penalty . . . . we enforce the rule of right not only by imprisoning the thief but by depriving him of plunder and restoring it to its true owner."

May sanction include rewards?

rewards. Suppose the Government passes a statute providing for destruction of wild animals and proclaiming a money reward to any one who kills a wild animal (a rabid dog for instance). There is no reason why this statute should not be taken as law. One failing to act up to the rule does not certainly incur blame; but he all the same loses the reward just as one failing to get his necessary degrees in the University can not acquire the rights conferred by them. In either case, one who successfully carries out the rule acquires a right to the reward or to the privilege. These laws create rights as much as others; and in the view of some learned jurists, the primary object of law is to create rights rather than to issue commands. "Do this and you will get this right" (as reward) is the type of all laws which create privileges in professions, patents, trade marks, or copy rights. They do not make it obligatory on any person to act or forbear in any matter, and, therefore, are not commands in the proper sense of the term; but if, as has been already indicated, they create, when carried out, rights in some persons, as they undoubtedly do, they cast upon others corresponding duties to recognise those rights, and are, in that sense, cammands. Then again, there is another way of looking at the whole situation. Every law may be looked upon as a conditional command, laying down what will follow (*i.e.*, the sanction) if something is done or not done. The penal law of theft lays down that if one is guilty of theft he will be visited with a term of imprisonment or fine; a law of procedure lays down that if a litigant choses the specified court and adopts the specified form of action his suit will be entertained, otherwise he will be visited with a nullity; a law creating privileges and franchises, or offering rewards for meritorious acts, similarly lays down what consequences will follow in the event of something being done or otherwise So it seems that to include rewards within "sanction" is a legitimate extension of the doctrine of "nullity." In this view all laws would be commands with sanction in the sense that some inducement to act up to the rule is offered to persons concerned in the shape either of a positive evil or a nullity, or a reward (with the opposite alternative of losing it in case of failure which is very nearly of the same character as a nullity). (c) That laws of evidence, procedure &c., involve a command on the judge on penalty of censure or dismissal or nullity [1]. (d) That repealing statutes, rules of interpretation, and other laws, which do not stand by themselves, are not to be taken by themselves, alone as isolated rules of law, but should be read and construed in their true sense, with reference to, and in connection with, others to which they are related; and that, so read and construed, they clearly stand as commands. A repealing statute in effect lays down that the law is as it was before the repealed statute was passed, and so reiterates[1] the commands embodied in the preexisting law. An interpreting statute explains, *i.e.*, clearly repeats, the commands involved in the law under interpretation. Rules of procedure are merely accessory; they define the legal sanction or express the persons by whom, and the conditions under which, it will be applied. Similarly, laws conferring privileges and franchises supply official recognition to new classes of persons and rights for whom and for the protection of which laws are meant. Enfranchising statutes, fixing constitution and conferring jurisdiction, define the constitution of the legislative organ whose chief business is to formulate new rules of law.[2] The gist of the reply under this head is that the totality of the legal system, the Law as a whole, is a body of commands as defined by Austin. Particular laws may not be commands by themselves; but they are mere adjuncts, as definitions and descriptions of persons, state organs, things, &c., with which the law is concerned, and of the mode in which it operates. This reply appears to involve some development of, if not a departure from, the orthodox Austinian idea, not less important, in spite of what Jethro Brown says to the contrary,[1] than what is involved in the doctrine of nullities. At all events, unless we are hypercritical, we can, in each of such cases, look into the substance of the law rather than into its form, and read into it a command either to the public to recognise it and forbear from interfering with the privilege or franchise conferred, and jurisdiction created, by it, to observe the rules of procedure or evidence, or to accept the interpretation, on pain of at least a nullity in case of disobedience.

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[1] This is Jhering's view.

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[1] Per Tindal C. J. - Hay *v* Goodwin, 6 Bingham, 582.

[2] Jethro Brown—Aust. Theory of Law—Excursus, pp. 338 *et seq.* and note on Art. 89, p 27 Robertson—article on "Law" in the Encyclopedia Britannica 9th edn, Vol. XIV, p. 358 Markby—Elements of Law, Art 6.

Reply to the third objection.

The third objection is met by the argument that judges have delegated authority from the sovereign and act as his spokesmen for making laws[2]; and that customs are not laws by their own force, for, in that case even immoral and unreasonable customs would be enforceable in the law courts; moreover, customs

Custom.

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[1] Austinian Theory of law, p. 27

[2] See Austin—Student's Ed. Lec. XXIX, p 547, Lec. XXX, p. 560. Markby—Elements of Law, pp. 11-12. Jethro Brown—Aust Theory Arts 94-95, pp. 28-29. Holland—Jurisprudence, Ch. V. It is said what the sovereign permits he commands. Some jurists are of opinion that this view is not natural and unjustifiable. See Gray—Nature and Sources of Law, Ch. IV, sec. 193 *et seq.*; pp. 83-84, Maine—Early History of Institutions, Lec. XIII But Markly's reply is that it is not merely permission, but permission *to a judge to order* with readiness to enforce that order by sanction and force, that makes the judge—made law the sovereign's command. See Markby's Elements of Law, p. 12, Art. 19.

may be abrogated by statute. It is only when the sovereign, through the pronouncement of the courts of law, stamps them with the hall-mark of positive law that they become so. The law students of the Calcutta University are made familiar, by their text book (Holland's Jurisprudence), with the conflict of views among Austinians themselves regarding the time when this recognition of the sovereign positivising a custom must be supposed to have taken place. Austin would fix it at the moment when the judge pronounces the custom to be valid and legally enforceable; and unless one is prepared to hold that no law can be given a retrospective effect under any circumstances, this view seems to be more logical and easy to understand than Prof. Holland's own view that we must any how find out some prior date, long antecedent to any judicial declaration in favour of any specified custom, when the courts, as representatives of the sovereign, had established as a general principle that customs, provided they satisfied certain conditions, would be regarded and enforced as legally binding. Prof. Gray apparently adheres to Austin's view in preference to Holland's as regards the power of judges to make laws and give them retrospective effect.[1] Whatever may be the more correct view—and this is not the place to study it more closely[1]—all the Austinians and Neo-Austinians are agreed that the objection under discussion, *viz.*, that judge made and customary laws do not emanate from the sovereign, is wholly untenable.

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[1] See Nature and Sources of Law Ch. IV, Sec. 224, p. 197.

Common Law.

With regard to the Common Law the view of the Common Law lawyers is that the rules of Common Law are not expressions of the State's commands. It is not true that they are Law because the judges have pronounced and enforced them, but the fact is that the judges pronounce and enforce them because they are the law. No doubt they are identical with the rules laid down by the Common Law judges; but the judges are not their authors, but only their discoverers. The untenability of this view will be apparent from the consideration that the judges may, as they often do, fluctuate in their pronouncements of the law; and the unsettled variation of the Common Law with each such oscillation of the pendulum of judicial opinion ill-accords with its supposed pre-existence and independence of the courts of law, the sovereign or the state. In fact, customs and the principles of common law stand, in this respect, on the same footing and equally depend on the recognition of the sovereign, by statute or judicial decision, for their characterisation as positive law.

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[1] An independent discussion and the author's own views on the relation of Custom and Law will be found in a later lecture.

Reply to the fourth and fifth objection

With regard to the fourth and a part of the fifth objection the Austinian reply would be that a definition, in order to be scientific, must proceed by the invariable and necessary ingredients and characteristics of the thing defined. A rule of positive law may not be morally just equally as an ethical rule of conduct may not be the positive law of a political society. We can only say that positive law ought to be right and just, whatever be the true criterion of right and justice; but not that positive law *is* right or just in the same sense as it *is* the command of the sovereign.[1]

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[1] Dr. Salmond himself admits that "the established law indeed may be far from corresponding accurately with the true rule of right" Salmond's Jurisprudence, p 51. Dr. Vinogradoff in his 'Common sense in Law pp. 26-27 remarks "many legal rules have nothing to do with moral precepts. If, as the result of the law of inheritance, the eldest son should have his father's estate and the younger brother be cut off with a scanty equipment, or if a statute makes the sale of tobacco a state monopoly such laws are certainly not suggested by ethical motives. Besides even when legal rules are connected directly or indirectly with an appeal to right it does not follow that they are necessarily passed in consequence of moral impulses The laws as to bills of exchange or payment of rent are dictated by commercial practice or by established vested interests rather than by moral considerations In short, numberless aims foreign to the ethical standard play a part in legislation and in legal evolution; national interest, class influence, consideration of political efficiency, and so forth. It would be a one sided conception indeed to regard laws as the maxims of moral precepts." From the point of view of scientific classification there is considerable force in this reply, but the question raised from the point of view of the philosophy of law, *viz.*, that in the study of the real fundamental feature of law we must not overlook its ideal perfect type towards which it must tend, that the real nature of a growing organism is to be found in its stage of highest development where all its qualities are fully matured and manifested, does not admit of this offhand and easy solution.

Fifth and sixth objection.

The fifth and sixth objections taken together represent in a nutshell the attitude towards the Austinian view, and the position, of the Neo-Austinian school and involve a theory of State and sovereignty which has grown up in recent times. One leading exponent of this theory and position is Dr. Jethro Brown.[1] The consideration of this theory which belongs to the close of the 19th century must be put off for the present and will be advantageously taken up along with the cognate sociological theories belonging to the same period in a subsequent lecture. Law is a norm or standard fixed by *the State* is a modernised form of the Austinian theory introduced in the continent of Europe by Binding, Bierling, Jhering and others ; and it, like the Neo-Austinian view, requires an examination of the more modern conceptions of Society and Government.

The American theory.

I shall now proceed to examine another phase of the Analytical theory of law which has come to-be favoured by only a few jurists in England, but by many in America, and is supposed to meet the objection of the common law lawyers that English common law is, to a great extent, created not by the direct commands of the Government but by the pronouncements of the judges.[1] In defining Law with reference to its origin it puts the law courts into greater prominence than the sovereign or the legislature, and describes it as consisting of "rules recognised and acted on in the courts of justice."[2] It does not indeed propose to deny the authority of the State or the sovereign as the ultimate or, as Dr. Salmond puts it, formal, source of law, or to dispute the formal accuracy of Austin's definition of law as the State's command enforced, if necessary, by its forces.[3] Its real object is to emphasise (1) that we should turn to the Courts of Justice instead of to the Legislature to discover the true nature and origin of Law ;[4] (2) that an act passed by the legislature is not law but "a law" which is really nothing but a material source of law[5] ; and (3) that Law is logically subsequent to the administration of justice, or, in other words, that a rule is law because courts of justice would apply and enforce it in deciding cases, rather than that courts of justice would apply and enforce it because it is law[6]. It is asserted that the administration of justice is perfectly possible without the law at all and the suggestion is (and in fact the theory would lose all its force unless such a suggestion is implied) that law would be impossible without the administration of justice by the courts of law. The arguments of Dr. Salmond[1] that in some societies courts might and possibly did exist and decide disputes by exercise of their unaided discretion without the guidance of any fixed legal principles and[2] that courts of law, even in administering fully developed systems of law, have to decide facts independently of law and, in deciding cases involving novel complexities for the solution of which the pre-existing legal rules are inadequate, to apply new principles, borrowed from various sources, as law may be admitted; but what is the logical conclusion ? Is not Law logically prior to its application? Even in the most glaring instances of judicial legislation where a judge for the first time enunciates a new rule of law and creates a precedent on a point "of the first impression," we have logically first, the positivisation of the rule by the judge for the occasion, and then its application in the administration of justice[2]. The public, it is true, must acquire their knowledge of the new law after and through its concrete application ; but that does not affect the real logical sequence of law itself and its administration by the courts. That laws may exist independently of their administration by courts of justice is not only conceivable but is a fact of common knowledge. There are laws whose administration in many societies has been left solely in the hands of executive officers and wholly exempted from the jurisdiction of the courts of law. It is Law that determines and regulates the methods of administration of justice, the constitution and functions of the courts and the limits of their jurisdiction. Adjudication is only one of the several sources (instrumental sources) of Law and the attempt of the American School to define Law by reference to the agency by which it is usually administered reverses the correct logical sequence and moves in a vicious circle. Dr. Vinogradoff in commenting on this doctrine[1] says that it "does not change the fundamental principles of the doctrine (Austinian doctrine) since it is clear that courts of justice derive their binding force from the state. The direct purpose for which judges act is after all the application of law and therefore they cannot be said to exercise independent legislative functions. A definition of law starting from their action would there-

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[1] See his works 'Austinian Theory of Law' and "Underlying Principles of Legislation."

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[1] Advocated by Gray Salmond, Willoughby and others.

[2] Salmond—Jurisprudence p. 9. Gray—Nature and Sources of Law, Ch. IV, p 84, sec 194, p 85, sec. 199; and pp. 86-87, sec 202.

[3] Salmond—Jurisprudence Art 17, pp. 48-50 and p. 52, para. 2.

[4] Salmond—Jurisprudence, p 10.

[5] Salmond—Jurisprudence, p 9.

[6] Salmond—Jurisprudence, pp. 19, 130

[7] Salmond—Jurisprudence, pp. 12 and 13.

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[1] Salmond—Jurisprudence, p. 12.

[2] I omit to mention here two other objects which this theory seems to have in view, *i.e*, to point out and avoid two other supposed defects in Austin's definition, viz.; (1) that it does not associate law with its essential element of right and justice, and (2) that it fails to include rules which, though they are undoubtedly laws, are not commands either in substance or in form—defects already noted and discussed above in the body of this lecture.

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[1] In his "Common Sense in Law pp. 31—32.

fore be somewhat like the definition of a motor car as a vehicle usually driven by a chauffeur. The difference between the decree of an absolute monarch, a statute elaborated by parliament, and a legal principle formulated by judges is technical and not fundamental. All these proceed from the authority of the sovereign."

The American theory explained with reference to the peculiar conditions subsisting in the country.

In England the legislature (British Parliament) is supreme; its enactments are binding on the judges who cannot question its authority and jurisdiction. In the United States the constitution rigorously defines the functions and authority of the local and supreme legislatures and the judges are at liberty to declare laws illegal and *ultra vires* if in their opinion the legislatures had, in passing them, transgressed the limit of their jurisdiction. There the Supreme Court thus assumes the higher position of weighing the legality of the enactments of the Supreme Legislature; and, in practice, legislatures have often to meet rebuffs from judicial pronouncements. It is this difference in the local conditions and constitutional distribution of the sovereign authority between the legislative and the judiciary in the two countries that explains the new American conception of law.

Services of the Analytical school.

It must be admitted that while the labours of the Philosophical school are generally exhausted in speculations regarding the fundamental basis and ethical ideals of the law, and the researches of the Historical school spent in enquiries regarding its origin and modes of development, the law as it is, its departments, the legal rights and their classification and detailed examination, as are often found to be more useful for the practical purposes of life, have received greater attention and with more fruitful results, from the hands of the Analytical jurists. Some subsidiary but often discussed points arising in connection with laws in the Austinian sense of the term may be shortly noticed here before closing this review of this school and its theories.

The generality of Law.

1. A law is said to be a general command. This generality is supposed to be not merely a nominal but an essential element of law. According to Austin a command is general when it obliges a person or persons "generally to acts or forbearances of a class."[1] If this means *an indefinite number* of acts or forbearances, a subtle critic may argue that a command which is clearly *particular*, as determined by this test, when it directs the performance of some definite positive acts for a specified period, may be, under exactly similar circumstances, and judged by the same test, general, if only it had directed *forbearances*. A father directs his son to read his lessons every morning for one month ; here the number of acts to which the son is obliged is thirty, and

Austin's test.

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[1] Jethro Brown—Austinian Theory of Law Art. 59, p. 16.

hence the command is particular. But suppose the father directs the son not to leave his house on any account for a month. Here the number of forbearances ordered is indefinite and must we then take this as a general command? The substance of Austin's test, however, is that whenever, on a consideration of all the circumstances of the case, *e.g.*, the nature, number and frequency of the acts or forbearances ordered and the length of the period for which they are to be carried out, the intention of the superior appears to be not to dictate the performance of one or a few isolated duties but to lay down a rule or course of conduct, it is a general command or law.[1] Other writers have proposed other tests of this generality:—

Other tests.

(a) Particular commands are addressed to particular individual or individuals; general commands are addressed to a class or an indefinite number of persons[2] (Ateius Capito, Ulpian, Cicero, Blackstone, Bentham, &c.)

(b) Commands, in order to be general, *i e*, laws, must combine both tests of generality, *i.e.*, must be directed to an indefinite number of persons as well as enjoin an indefinite number of acts and forbearances. Roussean,[1] Sir Henry Summer Maine, and Prof. Jethro Brown seem to be of this opinion. Maine apparently thinks that in modern states the distance between the people and the sovereign is so great, and the connection between the two so impersonal, that laws emanating from the latter for the ordering of the actions of the individuals must of necessity affect the mass in general and refer to general courses of conduct. They can hardly be directed only to a limited number of individuals or refer to a few isolated acts.

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[1] *Ibid.*—Note on Art. 60, pp. 17-20.

[2] See Pollock's Jurisprudence, p. 34. Markby—Elements of Law,

(c) Neither test is effectual; for even a most isolated decree, say a decree for recovery of possession of property in favour of A against B is really addressed to all the members of the executive to carry it into effect and to all persons in the community to refrain from all classes of acts calculated to interfere with its execution.[1]

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[1] Rousseau—Le Contract Social II, Ch. VI Maine—Early History of Institution p. 393 Jethro Brown—Austinian Theory of Law note on Sec 60 at p 20 "There seems no adequate reason for failing to insist upon generality of persons as well as of acts. The grounds which apply in one case apply also in the other. Austin's failure in this respect may be attributed perhaps to an oversight of the fact that a command apparently to an individual is often really addressed to a class An act of parliament applying to the Lord Chancellor applies to him not as a particular person, but as holder for the time of a certain office. On the other hand an act of parliament which applies to a particular individual or enjoins a definitely limited number of acts is to be described as an Act of administration rather than of legislation." See Clark—Practical Jurisprudence, pp. 112-113.

(d) The proper test of a general command or law is perpetuity. What is meant to be operative for an indefinite period is law.[2]

Whatever may be the test, almost all representative thinkers, ancient or modern, are agreed that laws, at least those upon which a science can be built, must be general. They are rules of human action, *i.e.*, they fix the standard by which the bulk of the subjects should regulate their actions. An isolated statute of the legislature declaring the will of the sovereign regarding a particular act or a particular individual may or may not be "a law" in a crude or practical sense, but is certainly irrelevent for the science of law. A command which directs one or a few particular acts, if it does not expressly or impliedly impose any rule for the future guidance, after the occasion has ceased to exist, is thenceforth a mere dead latter; and one which is addressed to a particular individual by name, and not by his office, is also as good as non-existant for the society in general. For students of the science of law, therefore, laws are only those which yield principles, it may not be to the whole mass or for all time, but for classes of men and for occasions which generally recur.

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[1] Amos—Science of Jurisprudence, p. 74.

[2] Esmein—Elements de Droit constitutionnel, (1899), p. 9; Duguit—Le Droit objectif et la Loi positive, (1901), p. 503.

Rules imposed by private persons.

2. Rules imposed by private persons in pursuance of legal rights are regarded by Austin as positive laws.[1] Following the analogy of laws imposed by subordinate political superiors, he interprets these rules as commands set by the sovereign circuitously or remotely through subjects clothed by him with legal right or authority for the purpose. It is difficult, however, to follow Austin's illustrations on this point. He divides the rules into two classes:—(a) those which the subject authorized has a legal duty to make (*e.g.*, a guardian *legally bound* in the exercise of his legal authority over the ward to make rules *for the benefit* and guidance of the ward), and (b) those made in the absence of such legal duty (*e.g.* a master fixing *for his own benefit* a course of conduct for his slave). Rules falling under class (a) are pure positive laws; those under class (b) are partly positive law and partly positive morality according as they are imposed in pursuance of legal rights or otherwise. The rules set on the slave by his master are positive

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[1] Jethro Brown—Austinian Theory of Law—Arts. 143-47, pp. 42-44.

law but not those set by parents, masters or lenders to children, servants or borrowers. This makes the test of legal duty to make rules useless for the purpose of classification; and further, this view, even if technically correct, leads to an unnecessary multiplication of the number of laws and lawgivers. The obligatory character of the rules in such cases may well be regarded as a corollary or incident of the legal right itself, which, by its nature, entitles its subject to the subservience of other individuals to his will (within the limits of the right) which is a part of the duty corresponding to the right and is created and expressed by the same law which created the legal right.[1]

They are obligatory as mere incidents of legal rights.

Moreover, as Prof. Brown acutely points out,[2] a law is positive when its sanction is enforced by the state; but the laws or rules laid down by guardians, headmasters or clubs usually lack this characteristic. The rules of conduct fixed by them are obligatory, but the sanction which will be enforced by the law courts will be that fixed by the law which created the right and not what is fixed by the private lawgiver. The law court will not necessarily inflict on the recalcitrant ward, student or member the threatened chastisement or fine by which the offended guardian, pedagogue or club sought to secure obedience, but may visit him with some other evil selected by itself. This last observation, however, does not go far enough, for it turns upon the extent of the right conferred. When the legal right to make rules conferred on a private person includes the power of fixing appropriate sanctions,—and Austin might have contemplated such rights alone,—it is not unlikely that the law courts will give him help and facilities to enforce his own threatened sanctions. A railway company makes a bye law imposing a fine of Rs. 50 on any passenger who without sufficient cause stops a train by pulling the alarm chain or chord. Here the law courts will, in a proper case, realise the fine. According to Brown this would be apparently a law because the sanction fixed by the bye-law is enforced by the law courts. If so, Austin is right in his assertion that rules are laws when made by private persons in pursuance of a legal right, provided the right goes far enough so as to authorise the particular sanctions fixed by the rules. A more substantial distinction may, however, be made to rest upon the character of the rules, their authors, and the legal right by virtue of which they are made. Most of the instances mentioned by Austin may be eliminated as particular commands being addressed to definite individuals or bodies of individuals. Where the legal right confers extensive powers and for the regulation of important and extensive interests, and the rules themselves affect large classes of men and purport to cover a large area of the field of human action, we may appropriately call such rules laws; and their authors may be taken to acquire, by virtue of their legal right and authority, a public character. Such rules are not laws made by private persons in pursuance of a legal right, but may be regarded as emanating from a public body with delegated authority from the sovereign, or, in other words, a subordinate political authority.

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[1] See Austin himself—Jurisprudence, Vol. ii, p. 524. Jethro Brown —Austinian Theory of Law—the note on Sec. 152 at p 47. "These rules do not establish any new law, but only bring into operation some existing law." Gray—Nature and Sources of Law, pp 104-5; 149-150 "These rules constitute facts to which the law of the State is applied for coming to a decision. We may put this view in the form of a syllogism.

1. All contracts are binding (law).

2. A club has made these rules, and A becoming a member has agreed to abide by them, *i.e*, entered into a contract with the club as embodied in the rules. (facts)

3. Therefore the rules must be enforced (decision)

[2] Austinian Theory of Law—note on Sec. 152, pp 47-9.

After all, it is a question, more or less, of nomenclature. Rules, if they are authorised by the state-and enforced with the help of the force of the corporate society, one may be at liberty to call laws whether they are made by a club, a guardian, a pater familias or a corporation, but it would be, as Prof. Gray points out,[1] very inconvenient, and a wide departure from usage, both popular and professional. Such laws, moreover, would be mostly useless for the science of law.

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[1] Nature and Sources of Law. Sec. 240.

Administrative and military rules.

But what about administrative or military rules framed by executive officers of the Government? Colonels, postmasters, chief engineers, finance officers &c., may frame, by virtue of the authority vested in their office, general rules for the regulation of the army, post office, roads, public works or accounts. They cannot be always differentiated, as some writers attempt to do,[1] from laws proper as particular commands, for they might be, and many of them are, in fact, general rules of conduct. Prof. Jethro Brown wants to eliminate them as rules of executive discipline with the enforcement of which the lawyer or the courts are not directly concerned.[2] This is hardly scientific, and besides savours of the judicial school and theory of law, which has, as noticed before, appeared in America, and to which Prof. Brown does not belong or subscribe. Curiously enough, Prof. Gray who does so belong, points out, by citing possible cases, that law courts may have occasions to apply and enforce these executive rules and their sanctions as much as others, and admits, though unwillingly, that they can not be logically kept out of the category of laws.[1] It is certain, however, that they have little value so far as the science of law is concerned [2] and the debate regarding them is not of very great importance.

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[1] Hearn—Legal rights and duties, p. 9.

[2] Austinian Theory of Law, p 49. See also Mr. Frederic Harrison in the Fortnightly Review, 1878, pp 24, 689

Object of previous discussions

I have led you, even at the risk of trying your patience, to a consideration of the above details in connection with the Austinian theory of law, with a purpose. The progress of civilisation, knowledge and ideas, the evolution of the conception of the society and the individual and of the nature of their mutual relation since Austin's days has been great indeed; and in the light of the new political and social situations, ideals and necessities it has been found necessary to remodel the imperative theory of law in more modernised forms. Analytical Jurisprudence, as we have already seen from the criticisms, and shall see hereafter, has developed and is no longer absolutely identified with Austin's text in the same way as Philosophical Jurisprudence has developed, with the march of time and events and knowledge, and is no longer identifiable with that of the Law of Nature Schools or of the Metaphysical jurists discussed in the previous lectures. Each of them, however, has left behind some kernel of truth—some substantial contribution to the science of law which has to be taken into account and valued as its proper worth. Till lately, it had been a fashion in England and America to deride the Philosophy of Law as developed in the 17th, 18th and the first half of the 19th centuries, and also, with the rise of sociological ideas, to decry Austin altogether ; and I cannot do better than quote Prof. Roscoe Pound's well administered rebuke: "The present Anglo-American attitude toward the philosophy of law has its counterpart in the phase of juristic thought from which we have happily emerged, in which it was fashionable for every dabbler in jurisprudence to have his fling at Austin."[1]

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[1] Nature and Sources of Law Sec. 246 p. 108. Har. Law Review April 1892, p. 25.

[2] Jethro Brown—Austinian Theory of Law, p 49 bottom,

Modern tendencies

The fact is, as I have noticed at the close of the last lecture, that at the end of the first half of the 19th century the individualistic mechanical conception of society was fast dissolving and the organic conception, with its concomitant economic and legal theories and ideals, was rapidly developing and engaging public attention. The social and economic struggles were becoming keener ; and the trend of philosophic, social and economic juristic theories soon came to be marked by the sociological tendency which is characterised by two new features, *viz.*, (a) a change of the point of view from the interests of the individual to those of the classes or of the society in general, and (b) the turning of the theories from the abstract ideals to concrete practical phases and questions of real life which all the schools and theories had hitherto more or less ignored.

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[1] Scope and purpose of Sociological Jurisprudence, 24 Har. Law Review, p. 607.

Defects of the earlier schools

The Historical School and the Metaphysical School, of the early nineteenth century, attempted only an explanation of evolution in general by abstract and practically unfruitful theories, and the utilitarian theory of the Analytical school was, as Sir Henery Sumner Maine remarks, mere tautology.[1] Both were insufficient for meeting the requirements of the times. The Analytical school lost its hold on the world of thought on account of its too limited field of enquiry, its mechanical and individualistic conception of society, and its tendency to develop all legal principles only by deduction (or legal fiction) from the fund of rules already established by the legislature and the courts of justice, so long as no deliberate change by positive legislation was made;—a tendency that is not suited to the rapidly advancing progress of the world in recent times. But all the same its negative service to the cause of juristic science cannot be overlooked; for it served to dispel many of the apocryphal reasons that used to be urged and accepted by popular and professional opinions for the various established rules of positive law and thus cleared science of many errors and fallacies.[1]

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[1] Ancient Law—Ch. V, p. 118 "Expediency and the greatest good are nothing more than different names for the impulse which prompts the modification and when we lay down expediency as the rule of change in law or opinion all we get by the proposition is the institution of an express term for a term which is necessarily implied when we say that a change takes place."

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[1] Gray—6 Harvard Law Review, p. 21-23, quoted by Roscoe Pound in 24 Har. L. Review, p. 608.

PART II.

THE

Sociological Tendency.

LECTURE V.

GENERAL OBSERVATIONS—THE ORGANIC CONCEPTION.

Individual, Society and State

THE relation of the individual to the society and to the State has been, as we have seen, differently interpreted at different times.

First stage—State Predominant

In Greece

In Rome

During the Republic.

In the Greek civilisation and philosophy the individual was virtually merged in the (city) State, and confined to the duty of abiding by the social order which fixed his class and functions. The spirit of individualism of the lower classes, who did not participate in the government as citizens, was not then awakened; and justice was identified with this crushing of the individuality of the members under the weight of the social system. In the Roman period, during the Republic, when the commonwealth had emerged in glorious strength and unity after the struggle of the two classes, the nascent individualism of the masses had for a time asserted itself, legally and politically, by wresting a share in the legislation and government of the society. Unlike the Greek cities, the Roman Commonwealth, in its maturity, allowed free scope to the members of all classes to rise to prominence by labour and merit. The recognition of the principle of individuality in Jurisprudence is supposed to have been secured by the Law of Nature and Equity introducing legal rules and principles which penetrated the family and rounded off the orthodox patriarchal authority and ameliorated the ancient Jus-Civile, in its crude Law of Persons, *e.g.*, *re* the degraded status of the *filius*, the woman, the infant, the slave; in the Law of Things, *e.g.*, of ownership, and of other property rights, and of succession; and, specially, in the Law of Contract. A backward movement, however, was set on foot, when, by the concentration of all political and legal power in the Emperor, the crystallization of Equity, and the growth of Legislation, the doctrine of absolute sovereignty decidedly curbed the free individualism of the Republic. In the Middle Ages, civilization, which alone fasters the individualism of the people, was set back, and the domination passed from the hands of the secular Emperor to the head of the Church. The individual had to hold his liberty, opinions, faith and conscience at the mercy of the Christian ministers and their organisations.

During the Empire.

In the Middle Ages

Second stage—the individual asserting.

A rent in the cloud, which had covered under its dark veil all independent intellectual moral and spiritual life and aspirations of the individual appeared when the Germanic Emperor felt himself strong enough to question the claim of the Pope and his organisation to absolute universal sovereignty; and a loophole was thus allowed to the individual to take up the advantage, offered by this struggle between the two opposing claimants to supremacy, and to secure some recognition of his value and importance. The arbitary claims of the secular monarch, after the precedent of the Roman Emperors of old, and the stringent feudal rules, together with the economic bondage and the stratification of society of the later middle ages in Europe, however, did not afford any adequate or encouraging outlet for individual liberty, while the awakened spirit of individualism under the influence of scientific, educational and religious Renaissance was fast rising into prominence; and we have seen, how, at last, the efforts of the leaders of the Reformation, the Tyrannomachs, and the 17th, and 18th Century philosophers and jurists effectually served the cause of individualism and nationalisation of the laws by their religious, philosophic, political and juristic theories and dogmas.

Leaders of the movement.

We have also seen how the doctrine of Law of Nature and Social Compact, which at first lent its support to the secular sovereign, was utilised for controlling the autocracy of rulers and irresponsibility of legislation. The rationalistic expositions of the doctrine of Nature, in the 17th and 18th centuries, of Grotius and his successors, as also those of the English and French materialistic schools were both uncritical and dogmatic, and based on

Services of the doctrines of Social Compact and Law of Nature.

assumptions, *e.g*, as to the nature of men, as to the State of Nature, as to the fact and the terms of the supposed social pact, and as to the theory of knowledge and relation of mind and matter; and they were disproved by their own mutual differences and contradictions, as much as by the Critical Philosophy of Kant. Kant's formalism led to the abstract form of liberty being taken as the cardinal principle of Nature and the basis of all laws and legislation. It was the liberty of the will of the individual wholly purged of all considerations of the tendencies, motives, necessities or utility which might lead the will to some definite line of concrete activity. Kant's formalism, in its search after 'critical' truth free from presuppositions, dogmatisms or assumptions, landed the philosophy of law on a baren, abstract and colourless Utopia of individual freedom, which failed to be fruitful for the practical purposes of real life; for it failed to recognise that law and its principles are not eternal, but must change and grow along with the history, civilisation and environments of the peoples and societies. The consideration and explanation of these concrete factors,—the changes and developments of human institutions was taken up in the first half of the 19th century, philosophically, by the Metaphysical Schools, and, historically, by the German Historical School; and they made it a common point to regard Law and other

Kant.

The Metaphysical and Historical Schools after Kant.

human institutions as essentially evolving entities. But they had common defects which failed to secure for them that lasting homage which, but for these short—comings, might have been accorded to them. One of these was that, while recognising that societies and their institutions were constantly evolving, they regarded the direction and mode of this evolution as eternally fixed and regular, and as capable of being formulated in mathematically rigid propositions. Accordingly, while displacing the eternal and unchanging Code of Nature of the 17th and 18th centuries, they gave rise to pseudo—natural laws of the evolutionary processes from which the derivation of all principles of the practical sciences of legislation, law, morals and politics was a mere matter of deductive reasoning. The next defect was, that the individual was placed uppermost, and the society was held to be a mere aggregate of individuals. Whatever was looked upon as the goal and end of the evolution of human life and society, that goal was essentially *for the individual*; and the attainment of that goal by every individual for himself necessarily meant the same for the society as a whole.

Their defects.

It was the Organic theory of Krause, developed along the line of philosopic reasoning of Schelling, which, however, marked a point of departure from this last characteristic

Third stage-tendency towards socialisation.

tendency or defect of the early 19th century thought; and we have found that this organic conception naturally grew up and was fast making head in both philosophical and historical circles (c.f. Krause, Puchta), as soon as the doctrine of flux had completed its labour of demolishing the old idea of an eternal law of nature.

Causes that gave rise to this tendency

The individualistic doctrines, of Grotius and others down to the representative exponents of the German Historical and Metaphysical Schools and of the English Analytical School, in Jurisprudence, the atomisation of society and *Laissez faire* in Politics and legislation, and the theory of free competetion for each individual, of Adam Smith and others, in Economics were all tried in the balance and found wanting. We have seen in the previous lectures that the labouring classes were suffering through these doctrines in a way which created widespread discontent and commotion. The new class questions were becoming formidable; and a completely new method of handling the situation, with special reference to the real facts of present history, was urgently necessary in politics, economics, and jurisprudence.

The period of transition and the world movement towards collectivism.

The period of transition, from the stage of individualism to that of solidarism and collectivism, in its variety of phases, is marked by a tendency, commonly developed by all the schools of juristic thought, to regard the law and society as meant not merely for the sake of protecting and furthering individual interests but also for the sake of the purposes and interests of the larger sections or of the whole of the body of individuals composing the society and organised in the State. We will now-examine and compare some of the leading exponents of these various schools at this period for the purpose of elucidating the great world movement towards solidarity and collectivism.

The philosophical schools—(A) the Hegelians.

Let us begin with the most philosophical—idealistic of these schools, viz., the Hegelians, and select two different types of them—one, an exponent of religious faith and creed, and the other, of reason as the basis of all human institutions and development. Stahl (1802-1861) proposes to seek the fundamental basis of ideal justice and the principles of law and ethics in religious faith and divine will, according to which human relations must be adjusted and regulated so as to make them conform to this ideal. Man, formed in the image of God, is desired by God to observe rules of Ethics or morality so that he may be true to his original ideal. The subjective conformity of the individual to these rules (subjective custom or Ethics) corresponds to, and is objectively represented in, the customs or moral order designed by God for the society or the whole

Stahl.

Stahl represents the Prussic view of the State, its authority and coercion.

human race; and the secular order of Law, backed by force and compulsion, is necessary for the maintenance of this moral order against individual way-wardness. Stahl, representing the conservative Prussic view of the State and its authority and coercion, adopts the Historical view that Law and State arise in the consciousness of the people, and also the Hegelian doctrine that private law is based on the conception of 'legal person' (individual) having rights (property). At the same time, he unfolds his theological as well as sociological tendency by propounding that the ultimate basis of these human institutions is the divine will and order which is realised in the moral and intellectual realm of the State, and that its public law is based upon the common character of the people. Individuals are regarded by him as the self-appointed servants of the State for the furtherance of its purposes to realise the moral order which is the perfection of human comunial life. The State is thus raised to a higher importance than the individual, and the public duties than private rights. The hereditary monarch, the constitution providing the limitations of the legal power, and the representation of the people in the Government are the three main-stays which uphold the State and the moral order of law; and they owe their sanctity and authority from the will of God.

Stahl proceeds *deductively* from the doctrine of faith (this is his philosophical method), and accepts reason, though not as the source, but as a means of recognising Justice which is desired and willed by God (this is his compromise with the rationalistic position of Hegel which he could not renounce), and pleads for the loyal subordination of the individual and his interest to the authority and purposes of the State and the constitution. He idealistically realises the State as a person through its representative the personal king and monarch.

Trendelenburg.

Trendelenburg (1802-1872), more directly Hegelian, or rather Platonic and rationalistic, deduces the ("idea") ideal of Law and Ethics, their outlines and mutual relation, from the inner necessities of human nature seeking to realise itself, i.e., its ideal fulfilment, in the community. He proposes to be more realistic than Hegel and more teleological, in as much as he regards all motion or progress as due to the immanent necessity, which is not merely abstract or logical (as Hegel conceived), but material and intuitional, for realising some ideal or "idea". He metaphysically posits this ideal of human nature as that of the universal man,—of the human community as a whole, as one ethical organism. In order to attain this ideal ethical end there must be in Law an organisation by which individual liberty and interest are subordinated to those of the entire body; and there must be also some principles to check and control the whole-sale userpation of authority by the Government acting in the name of the corporate body. The whole ethical body as well as its parts (individuals) must be preserved alike by Law; and this represents the ethical side of Law, *i.e.* Law as a norm of reason based, however, not on abstract premises, but on historic facts and material necessities for the realisation of an ethical ideal. Law as a coercive norm represents its physical side backed by force as a means for the achievement of the ethical end against the opposition of recalcitrant individuals. It is, besides, a logical norm proceeding logically in its formation of concrete rules and in their application. It is connected with Ethics as means to an end. Law and Morals seek to control and guide the objective (external) and subjective (internal) volitions of individuals so that they may together subjectively lead all men to the ethical order which is the objective realisation of the ideal of human nature and the teleological end of Law as well as Morals.

Law and Morals.

The Hegelians, as above exemplified, proceed philosophically to construct their legal theories on some supposed ideal, of justice or of human nature;—this ideal being recognised as realisable only in an ethically organised communal life. The Formal (Kantian) theory of individual liberty, its estrangement of law and morality, and its view of an elaborate Law of Nature completely isolated from the positive laws of societies and the changing forms and ideals of actual life, are abandoned. Both Stahl and Trendelenburg speak of Law of Nature; but with them it means now the philosophical expression of the necessities, ideals and historical processes of evolution which underlie all systems of positive law and by which we can appraise and determine their character, value, progress and ultimate goal or object.

Law of Nature as understood by the Hegelians.

(B) The Organic School Ahrens.

Turning to Ahrens (1808-1874) who elaborated his "Encyclopedie" ("Juristische Encyclopedie") on the Organic theory of society and law, supplied philosophically by Schelling and Krause, we find a still more advanced conception of society, in direct opposition to the mechanical and individualistic conceptions of the older days. For the proper appreciation of Ahrens' philosophy of law (Naturrecht), I invite your attention again to the doctrine of Krause which I discussed in a previous lecture, and which Ahrens applies in the elaboration of his philosophic jurisprudence. Like Krause, he departs from abstract philosophy of law and lays stress upon its relation with the concrete conditions of life.[1] He paid, in his rationalistic explanation of law, greater attention to the economic order of society than Hegel or even Trendelenburg, and encumbered it with less and easier philosophy or metaphysics; and this made him more popular with the positivists (like Jhering and Jellinek) and the German economists of later days. Dr. Miraglia, in speaking of the philosophical schools, and in explanation of Ahrens' popularity,[1] says "Hegel, Trendelenburg and Ahrens considered the economic order of society," (neglected altogether by Grotius, Vico and Kant, the representatives of the earlier schools) "in relation to rational law. Hegel speaks of public wealth, labour, social classes, the price of merchandise, pauperism, immigration and the control of corporations. Trendelenburg treats of agrarian and forestry laws, of the law of the arts and commerce, of exchange, insurance, wealth and population. Ahrens studies the economic aspect of every philosophico-juristical theory" . . . . . "In the books of Hegel and Trendelenburg philosophy is the prevailing factor; those of Ahrens abound in details, and the speculative elements have not a large development."

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[1] Miraglia—Comparative Philosophy of Law, p. 98

The economic aspect more prominent in Ahrens than in the Hegelians

Through the stress laid, in Ahren's philosophy of law, on the economic interests and goods, for the ordered regulation of which Law is intended, Law and Economics are brought close to each other as ethical sciences, both governed by the ethical ideal of the good. Man and his ethical self-realisation in the good, in humanity in general, is the end of wealth and property; and economic laws, which guide individual and collective action in production, exchange, distribution, and consumption of wealth, are not like physical laws inexorably regulating the passive material objects of the world, but are moral and social laws directing conduct of men as free agents for some determinate purpose. This alliance of Law and Economics, and of the individual and the society, is explained by his cardinal doctrine that every factor of individual life is reciprocally conditioned, as in an organism, by other factors obtaining in the life of other individuals and of the society as a whole; and no science can keep itself isolated from the other sciences which deal with reciprocally conditioned parts of the whole organism of the universe. The development of the individual and of each individual good must be in harmony with that of all other individuals and goods in society; and the harmonious development of all individuals in unison and of all the goods of life making up the one supreme good is the end of Law. Ahrens divides these goods into two groups. First, there are the material goods which consist of (a) the personal goods, *e.g.*, life, health, honour, and liberty, arising out of the individuality of man, and (b) those which satisfy man's social and

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[1] See Comparative legal philosophy, p. 268

Ahrens' Organic conception of social life and the sciences.

Classification of goods.

intellectual needs, *e.g.*, language, religion, sciences and art. Lastly, there are the formal goods, *viz.*, Morality and Law, which represent no special human interests or goods, but an ordered correlation between them, the first, of the inner motives and ends, the latter, of the external limitations and conditions, of human activity for the attainment of the material goods; so that they may become mutually helpful, instead of clashing, for the furtherence of the supreme ideal or good.

Association of Law and Economics.

Ahrens laid great stress on these interests or goods needed for the perfection of human nature, and further divided them into personal and proprietary interests. The realm of personality comprises the individual, marriage and the family, the race, the nation or state, and, finally, the universal federation of nations; in fact, life in all its various evolving phases. That of property comprises the material goods which are mainly productive of legal relations. It is here *i.e.*, in the realm of material goods, that Economics and Law are so closely connected.

Kant and Ahrens contrasted.

Naturally, he opposed the formal theory of Kant and all its corollaries; for individual liberty is only one of the interests, which has to be co-ordinated with other interests and even subordinated to them, when (as in the matter of public health and safety) they are higher and more necessary for the preservation and progress of the whole organism. Moreover, Law and Morals are made to go together; and the former represents the sum total of the external conditions necessary for the harmonious development of the individual. Both aim at right action. Morality aims at right motives without coercion or penalty; Law at external right action, compelled, if need be, by coercion. The object of both is the ideal right and justice; and the positive law approaches the 'idea' of Law in so for as it is in accord with the right. Ahrens' "Naturrecht"[1] is again conceived in the same spirit as that of Stahl and Trendelenburg, as the philosophy of positive law pointing out its standard and ideal.

Law and Morals.

Ahrens' theory of society, based on the organic conception advocated by him, explains the different groups inside a society as representing the different organs calculated to administer to the different needs of human nature.[2] Collective bodies, such as the university, economic associations and the Church, are meant to correspond to the educational, economic and religious needs of human nature. They represent the various goods and interests, and the state is the bigger group, embracing the subordinate groups, having

Ahrens' Organic theory of society.

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[1] Law of Nature.

[2] See Korkunov—Theory of Law, page 332.

Culture-stâât.

function and end which is not merely negative or passive[1]. It is positive, comprising the subordinate functions and purposes of the lesser groups within it, for the perfection of humanity. Like Trendelenburg, he regards Ethics as the science of the supreme good (including its two off shoots, law and morality) and of its realisation through the free will. Ahrens regards "possession" as identical with material good, i.e. everything essential to man and worthy of human effort for the attainment of perfection. Ahrens, however, inspite of his valuable contributions towards the elaboration of the organic conception of the society and the elucidation of the truths about the close connection between Economics and Law, was a philosophical jurist; for he was deductive in his method, and, deriving Law from the inner nature of man and from the subjective ideas of obligation, regarded it as incapable of empiric treatment, like the physical sciences, on the materials of experience This position was rejected in general in the latter half of the 19th century; and we find the organic conception, and the sociological conception following upon it, thereafter treated empirically and scientifically; and philosophy and with it, the philosophy of law came, for a period, to be discredited altogether.

Ahrens a philosophical jurist. His organic theory distinguished from that of the scientific schools

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[1] Contra Kant

The scientific or positive schools.

Turning, next to the opposite school of thought which chooses to shun all materials and reasonings except those founded on experience, we shall now examine the positive philosophy of Comte, the founder and the greatest exponent of modern empiricism of the 19th century. In common with the older empiricists, like Locke and Hume, Comte holds knowledge as limited to the phenomenal world and its relations, and to be acquired by the scientific process of induction from the facts of experience. Attempts to reach the ultimate explanation of things (philosophy) beyond the realm of experience, and beyond the broadest generalisations secured by induction as to the sequence or concomitance of phenomena (causality), are futile. Apriori metaphysical positions reached by such attempts, and blindly accepted, are, like the cruder hypotheses of gods and angels of the mythical age, as mere fanciful concepts of thinkers invested with a spurious reality by illogical faith, signs of weakness of the undeveloped intellect. Comte thus holds to the scientific method alone,—the method of the natural sciences, physical (including mathematical and chemical) and biological, for by that alone certainty of results can be attained. The facts concerning Law and Government, though they concern human associations, are not thoroughly amenable to the scientific treatment; for their causes

Comte.

His positive method.

Eschews Legal Philosophy and builds up a Social Physics.

His Organic conception of society.

(motives and purposes) are often beyond the reach of scientific observation, and their modes of operation are uncertain. So while he takes up and scientifically applies his positive method in dealing with the various departments of knowledge, as Mathematics, Astronomy, Physics, Chemistry and Biology, he formally eschews a Philosophy of Law and Government; and, instead, he builds up a new science which he calls Social Physics or Sociology, in which the phenomena of intellectual and moral life of human beings, so far as they naturally arise out of the physiological functions of the nervious system, are treated scientifically, as those of animal life are treated in Biology. Of the phenomena of human associated life he includes as much as are susceptible to his positive method; and the departments of human activity which cannot be sufficiently explained by their resolution to scientifically ascertained causes or natural forces (c.f. those in which the highly enigmatical and unexplained operation of the so-called free will is involved) are left out; for, according to him, the method determines the science and not *vice versa.* The society as a natural unit thus comes to be opposed to the artificial unit,—the state, and the social order to the Law, and to be treated as the subject of a special social science. In his development of this science of Sociology Comte adopts the Organic conception of society, eschews the individualistic conception, and regards the individual as wholly a resultant product of the social and other forces and environments. The individual and the society are supposed to act and react upon each other. His whole position is founded upon the same idea of the necessary correlation of every kind of social phenomena, including Law, that had impressed the Historical and Organic jurists. But Comte newly conceived the idea (which he no doubt deduced from the above already well-established principle) that, on account of the fundamental solidarity and inter-connection of all diverse social objects and institutions, the social realities inside the society itself, in all their diverse forms and relations, can never be rationally separated ; but they must be taken simultaneously as a single unit both in their static and in their dynamic aspects. [1] This leads to the one science of the consecutive social states (each state being the static totality of all the diverse social aspects observable at any period) where each consecutive social state is "conceived as the necessary result of the precedent, and the indispensible cause of the subsequent state." Its object, therefore, in this regard, consists in the discovery of constant laws governing this continuity, whose sum determines the fundamental

Social Statics and Dynamics.

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[1] Cours de philosophie positive Vol. IV, pp 287-430.

advance of human development.[1] His mathematical and biological instincts led him to regard the life and development of the individual as solely dependent upon the society in which he lives as those of a limb depend upon the whole organism of the body ; and, but for a loop hole which he left in his sociology by admitting the efficacy of endeavour in the development and perfection of human societies, and affirming in the individual a special capacity of progressively rising superior to his environments, his doctrine would logically lead to a fatalistic determinism and to a denial of the efficacy of all deliberate efforts (of Law and Government) to improve the social conditions.

Logical result of Comte's scientific attitude

His refutation of individualistic theories,

We cannot, according to the sociological and positivist view of Comte, take the individual as an isolated member ; for his individuality is the product of his position as a member of a family, the primary social unit, and the higher social units, and of the society as a whole; and his existence, development and self realisation all depend upon the life and development of the higher social units. Man has ever lived an associated life in groups; and the impulses towards the establishment of Government and Law originate, not in the isolated individual suggested (as in the "social contract" theory) but in the social group. We must proceed, in Sociology, from the whole to its parts ;

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[1] *Ibid* pp. 365-366.

because it is based on the primary fact of collective social existence of men. The individualistic theories of State, Law and Government—the doctrines of Law of Nature and equality of men, the sovereignty of the people, and the social compact—all belong to the second, *i e.*, the metaphysical, stage of society, and are based on abstract concepts invested with a false and assumed reality. Men are not equal; the people do not, in fact, control the state; and there is no positive reality behind social compact. These theories are as unscientific as the conceptions of the first, *i.e.*, the theological, stage, when the society, State and Law were all supposed to be ordained and regulated by divine or superhuman agencies. Positive Sociology must not allow itself to be misled by such theological and metaphysical speculations not warranted by the positive facts of experience. Man and society and Law must be taken, not as abstract speculative entities to be approached and studied by metaphysical reasoning, but as historical facts; and their science should be based on the positive method—on actual facts of experience and history. The decadance and discredit of the philosophical theories of Law and Government in the latter part of the 19th century was, not to a small extent, due to the rise of the positive philosophy of Comte.

The turmoil, arising out of the complicated economic and social problems which by this time became acute, gave rise to a series of mixed class of writers, thinkers, and propagandists, who, while they were generally at one in their obstructive criticism of the existing order of things, varied in all possible ways in their proposed schemes of social and political reconstruction. These schools may be classified under three main heads, *viz.*, communism, socialism, and anarchism; and, like the positive philosophy itself, they all flourished in the atmosphere of an allround discontent with the existing established modes, systems and institutions in society, economics and thought. Questions of society and social institutions came to be handled by persons who, while lacking the scientific and logical genius of Comte, were ready to fall in with his great idea that these should be regarded as natural products of natural forces and placed in opposition to the artificial institutions of Law, State and Government with their powers of coercion and control. It was assumed by many that the latter were artificial products, and they had no claim to exist if their existence in any way spelt any opposition to the natural demands of the social interests. Through all of them, however, the spirit of solidarity, which recognised that the individual was to be interpreted by his class or community and not as an isolated unit, was an outstanding feature of all discussion and sentiment;

Communism Socialism and Anarchism

Their common features.

and all shades of opinion were permeated by a keen desire to judge of principles and ideas by their adaptibility towards the solution of the practical difficulties and necessities of the times, and the removal of the greatest blemishes of the social institutions of those days. You will at once perceive that these trends of the thought and opinion of the second half of the 19th century were only the more pronounced and developed forms of what had already been brewing since the tide of reaction had set in after the extreme individualisation which had culminated, in the realm of thought, in Kant and Rousseau, and, in the realm of action, in the American Independence and the French Revolution.

The great economic problem.

The great practical problem in those days was the economic problem which had been formally set before the world for solution by Count de Saint Simon.[1] He had pointed out that the industrial class, which was the most valuable and indispensable in the state on account of its highest productivity, was, under the existing system of Law and Government, unjustly debased and down-trodden by the proprietors and bankers ; and he pleaded for the inauguration of a newly adjusted just and generous social fabric calculated to do justice to each class or individual according to the true social worth and service of each. Practical schemes of social reconstruction were suggested by the later French communists, Fourier (1777—1837) and Louis Blanc (1811—1882), chiefly with a view to solve the problems of labour and unemployment. Under their theories of society and law, the society was regarded as bound to recognise the economic right of the individual to get work and minimum subsistence. The community as a whole, or the State, was under a legal and moral duty to protect individuals, especially those who were poor and incapacitated, from starvation, and to provide them with work, according to their capacity, when they were willing and capable of work. This was in distinct opposition to the individualistic theory in jurisprudence, the Laissez Faire doctrine in politics, and the classical theory (of Adam Smith) in economics. Free competition is not, as wrongly asserted by Adem Smith, conducive to the welfare of the community and of the individual; for under the present economic conditions it results in child labour, sweating, starvation wage, and, eventually, in the decay and death of the labouring class; and, besides, is injurious to the citizen classes on account of the cheapening of commodities,[1] and to the State by creating

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[1] Comte's conception of Society as a natural organism welded together by economic forces (which, as opposed to the state, he regarded as the proper subject of the social science) was derived from St Simon. See Lecture III.

French communism. Fourier and Luis Blanc.

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[1] The workmen being degraded, the quality of the manufactured article deteriorates; and the cheapening of commodities results in injury to the manufacturing class itself.

international industrial conflict and competition. The State should not remain passive and allow free destructive and unequal competition of individuals; it has the ethical duty of social organisation of labour.[1] It ought to establish a public system of agriculture and industry and also of other callings, *e.g.*, the literary profession,[2] and provide for the works of all classes (agricultural, industrial and literary) in these communistically organised systems.

German Socialism.

Karl Marx.

French communism was a direct issue of the French Revolution, and stood, in theory, though with a leaning of sympathy for the poorer and more depressed classes, for an economic commonwealth which guaranteed equal rights to all classes according to their economic merit and usefulness to society. German Socialism, on the other hand, demanded a class-stâât which would use its forces and cœrcion for the protection and promotion, especially, of the industrial or labouring classes. Karl Marx (1818 1883) was the famous founder of German socialism and, by his stern opposition to the capitalists and their unearned increment, he led the movement for a socialistic regime which would expropriate the small number of capitalists for the sake of the great mass of the labouring classes, conduct manufacture with a common public fund and make a just distribution of the profits arising therefrom. He described and supported this movement in the Hegelian manner, as a necessary historical process of evolution, which is bound to follow, according to the natural laws of economics, under the present system of capitalistic labour and the mechanism of exchange. Labour alone produces wealth (here he agrees with Adam Smith); and the produce of labour fetches its equivalent in gold. But the capitalist buys up the produce and sells it at a profit and secures an undeserved (unearned) increment By a repetition of this process he grows rich under the present system of machine industry. Capital lords over labour and the labourer has to part with his means of production, including land,[1] and is reduced to a mere wage earner.

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[1] See Jethro Brown—Principles of Legislation, Ch. VI.

[2] That this profession is starved and underpaid is notorious.

His dialectics of economic evolution.

The private manufacturers are expropriated and deprived of their home industry (which is no longer profitable) and they are socialised *en bloc* as a debased proletariat band working under a few over-pampered private factory owners and capitalists who had grown rich at their expense. The spirit of socialisation, arising out of common necessities, grievances and association, now permeates the labouring classes, and they become, in course of time, socially organised, acquring cohesion and strength in consequence. The socialisation and organisation of labour thus becomes a necessary historical outcome of the capitalistic production which involves expropriation of private agriculturists and manufactures. Side by side with this socialisation of labour, the concentration or centralisation of capital itself takes place through the same process of socialisation and incorporation, accompanied by the expropriation of individual capitalists. This last contest, now between corporate labour and corporate capital, is to end, logically and historically, in a complete socialisation of both labour and capital united together and vested in the organised society as a whole This is Marx's Hegelian elaboration of the dialectics of the history of social progress from the stand point of economics. He enunciated and developed this economic philosophy in his *Des kapital* as well as in his elebrated communistic manifesto of February 1848[1] justifying the economic revolution demanded by Germam Socialism. He substituted a materialistic, in place of Hegel's idealistic, conception of history in terms of the economic factors, and strongly emphasised the tendency of society towards socialisation. The economic situation and relations subsisting in a society decide the form, structure and organisation of the society (State) and the material contents of the law at every period of history. The economic relations between capital and labour at present are

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[1] The labourer grows poorer and is expropriated.

The communistic manifesto of 1848.

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[1] Issued by him and Engels.

unfair and unjust, and so also are the **State** or Government and Law upholding and supporting these relations. They encourage this unfair and unequal conflict, and the socialistic revolution demands their substitution by a socialistic order in which the society (State) itself will regulate production and its distribution on a principle, not of formal equality, but of natural justice.

The economic condition in England

French communism and German socialism were both protests against the inhuman exploitation of the labourers by the manufacturers In England, where the machine industries and commerce, protected by her navy, were the most flourishing, the exploitation of labour was the most outrageous. Successive blue book reports of the inhuman and outrageous treatment of labourers, including women and children, and the testimony of Sir Walter Scott, Dickens and Coleridge and even of the apostles of individual liberty and Benthamism like John Stewart Mill and Harriet Martineau established the growing aversion of the advanced thinkers towards the current industrial system and the social order which countenanced it.[1] But while communism in France was practically neutral, and wanted a social and economic amelioration, not necessarily destructive of all capital altogether, by some communistic

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[1] See Jethro Brown's Underlying Principles of Legislation, Ch. I.

Communism and socialism distinguished.

arrangement under the ægis of the State, Marxian socialism wanted to have a socialistic labour—state ready, by force and coercion, to expropriate capital and make labour supreme. Marx opposed the State as a capitalistic organisation favouring by its laws the economic enslavement of the masses, and sought to replace it by Society, *i.e*, a socialistically organised State with a just and fair economic system of production and distribution. He established that Law and Economics are intimately connected.

Marx's followers

The followers and associates of Marx, Lassalle' (1825-1864), Engels (1820-1895) and Rodbertus (1805-1875), are all opponents of the *Laissez faire* policy of non-intervention with individual liberty in economics and legislation. Lassalle stood for the Hegelian 'culture-staat' and pointed out the state's clear duty of assisting the individuals in their efforts towards self-advancement, which, standing alone, they could not possibly attain against the opposition of stronger classes Engels was more philosophic; and he analysed the economic conditions, which, according to Marx, determine the stages of historical progress of a society at a given moment, into their two elements, dependent respectively upon (1) the reproduction of life (*i.e.*, the number and condition of the families and individuals) and (2) the reproduction of the means of subsistance (*i.e.*, the stage of development of labour and industries). The last, Rodbertus, followed up Marx's views on unearned increment by denouncing all rent derived from land and interest from capital as unearned gain and unjust exploition of labour, and proposed to minimise this necessary evil by increasing the wages of labour. Private capital cannot be done away with, but it must be supervised and regulated by the state, so that its industrial enterprises cannot be self-seeking but conducted under state supervision with a view to public or social ends. Liberty, which had been the watch-word of the philosophers and thinkers down to Kant and Fichte, was now interpreted in a new light. Schelling, Hegel, Krause, Ahrens, and the other idealistic philosophers after them, had indeed, in their own way, already set their faces against the cruder, imperfect, and unregulated liberty of the isolated subjective ego, idolised by the individualistic doctrines, and pointed out the goal of a higher liberty realised in the socialised humanity; but their conception was now sought to be realised in the concrete field of economics, and what had been tought by them as an abstract universal principle regarding the all comprehensive ethical status and duty of the state (the culture staat) was now directed mainly towards the economic emancipation of the 4th estate, *i.e.*, of the labouring classes, and the establishment of a society economically organised in their interests in opposition to the state.[1]

Berolzheimer's review.

Dr. Berolzheimer[2] in reviewing the whole series of movements for this goal of liberty or emancipation since the close of the middle ages observes :—

"Since the close of the Middle Ages the watchword of the philosophy of law and economics has been "freedom." In earlier days the intellect was set free from the bar of the Catholic Church through the heroic efforts of Luther. Grotius released the law from its scholastic fetters; he brought rationalism to earth, and his contract theory contains the germ of the idea of popular sovereignty. In the same temper the 'Tyrannomachs' led the fight against tyranny. In these efforts it was at times forgotten that freedom represents a cultural ideal and does not consist in the complete independence of all conditions, but in throwing off the yoke of slavery; license was mistaken for liberty. Such an extreme and extravagant conception of freedom assumed equality as a rightful demand on the basis of "natural law;" and by way of Rousseau's

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[1] A luminious and attractive exposition of this growth of the ideal of liberty through various stages in the 19th century in England is to be found in the first chapter of Jethro Brown's Underlying Principles of Legislation.

[2] Legal Philosophies, pp. 284-287.

'Discours' and the destructive philosophy of the Encyclopedists, it led to the French Revolution. The after math of the Revolution, supported by the ethical philosophy of Wolff, brought about an enlightened absoluism. But the people, released from their fetters, exchanged them for leading strings. It was through Kant that the citizen was made to realise his right to freedom and equality; the great revolutionary philosopher was more radical than the provincial Robespierre. The latter was an extremist in action, but Kant was an exremist in thought. The issue of the French Revolution, as affecting freedom and equality, was destructive, nihilistic; Kant's philosophy was comprehensively synthetic. He erected a splendid edifice for freedom and equality—the "Rechtstaat;" and its economic complement was contributed by the physiocrats and Adam Smith. With these advances the process of emancipation, which brought law and government out of the bondage of the mediæval Church to the freedom of the modern world, would have been completed if it were the fact—as rationalism had naively assumed in the theory of contract—that the law was an independent institution. But the law is not something fixed, unalterable and absolute; it is flexible and subject to change, as was recognised by Schelling and Hegel. The study of its fluctuations, which condition legal advance and legislative reforms, led to the science of economics. In Marx and Lassalle a period of economic materialism set in, and a new emancipation became necessary, because a new class had been awakened to class—consciousness.

"The emancipation at the close of the Middle Ages and at the beginning of modern times was directed by temporal interests against the spiritual aggrandisement of the popes and their subordinates. The emancipation of the legal philosophers, from the 'Tyrannomachs' to Kant was centered upon the people. But the people, the subjects, the ruled classes, were, or appeared to be, the citizens in the cities and the independent farmers in the rural districts. The oppressors were the lords, the rulers, the ruling classes, together with the aristocracy of the feudal system. In the Kantian movement the people gained their freedom. But it appeared that such freedom was for the benefit only of the citizen class—the property owners, the capitalitts. The freedom and equality which the law guaranteed were legally and formally for the benefit of all, but actually and economically existed only for the property owning classes. This disparity between formal legal freedom and economic enslavement became evident through the spread of a new form of production, that of machine labor. There thus arose a new great class which was enslaved by the very medium of the law itself, which was exploited by the class of citizens who themselves had just attained their own free development. There became necessary a still newer and last process of emancipation through economic measures.

"Reviewing this order, there appeared in succession, temporal freedom as against ecclesiastical bondage; the freedom of legal government as against tyrannical rule; the freedom of private law as against the economic enslavement of the citizen and the peasant; economic freedom as against the abuse of the capitalistic power of the middle class: thus the circle of the great emancipation was completed. The process of emancipation of ancient days was concluded by the formal legal moralization of private rights; the process of emancipation of modern times by their material and economic socialisation."

Anarchism.

In Anarchism the opposition to the state and its authority and to the coercion of law is pushed to the extreme. It demands the abolition of the government and also of property and of capital. Money or capital wields the supreme power; "money in the present state of the society is the open-sesame "[1] and is the chief cause of crime. The citizen class handling capital and the machinery of exchange live a parasitic life at the expense of the productive labouring class, and this standing crime is supported by the force and authority of the state. The state is an evil, it uses its authority for its own aggrandisement, and of the nobility and officials; spends in war and aggresive foreign policy the wealth of the country which ought to be spent for internal improvement; and the only remedy for this evil is the destruction, even by violent means,[1] if peaceful measures do not suffice, of both capital and the government which supports it. In its first phase, anarchism was individualstic. Kaspar Schmidt (using the pseudonym of Max Stirner, 1806-1856) stood upon the classical individualstic theory of economics and simply wanted the freedom of isolation for the individual and release from all governmental law and control; but a more communistic doctrine was preached by Proudhon (1809-1865) who describes property as theft, and business as the art of buying at three franks what is worth six and of selling at six franks what is worth three. Individual property (as income or capital for business) and advantage is denounced; the only private property allowable for the individual is the ownership or right to the wages or

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[1] Grave, *La Societe Future*, p. 338.

Max Stirner.

Proudhon.

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[1] Modern social anarchists of a religious or ethical type are represented by Tolstoi and Tucker, who do not advocate violence but passive resistance; cf. that advocated by Mr. Gandhi in leading the recent non-co-operation movement against the bureaucratic government in British India.

other sums payable for his work under a contract. In a still more extreme (in the direction of communism) form, communistic anarchism was

Krapotkin.

advocated in Russia by Krapotkin (b. 1842); and this is very near the communistic socialism of France and Germany. In this form, anarchism shuns its individualistic position as insecure. Social cooperation is needed for the individual to fight against natural forces; and, standing alone, he is quite helpless and powerless against them. Conquest of nature and self-assertion of the individual can alone be secured by collective effort; hence, in this form, the anarchists advocate a society or social solidarity, such as would justify its existence by offering the individual greater assistance and opportunity for the freer and greater development of his self-realisation, in place of the State enthroned as an organised force bent upon robbing the weaker classes for the benefit of the stronger. Anarchisn thus does not, in the present day, go against communism or organisation, but only against the authority and force, and capital or private property.[1]

Influence of the social movements on juristic ideas.

The relevancy of the above acounts of the various theories and schemes of social reconstruction in connection with modern jurisprudence lies in this that they all point to a new ideal and conception of the society and its duty to the individual, as well as a new estimate of the requirements, rights and duties of the individuals with regard of the society and a general turning of opinion against the older view of things that society and organistion was meant only for police and peace and for affording to each individual the maximum of liberty consistently with the equal liberty of others. It was found that abstract liberty of the individual, regarded as the sole ideal and object of social and legal authority and control, works injustice and oppression against the weaker classes; that liberty in the abstract is an unreal and illusory ideal and meaningless for the individual unless the social and economic conditions and environments are made favourable for him by the (law of the) society. Liberty of contract under favourable conditions (as for the capitalists) meant liberty to grow and develop in wealth and influence; but under opposite conditions (as for the labourers) it was only liberty to perish. Jurisprudence, Economics and Ethics must be associated for working out a more concrete conception of liberty calculated to advance all the classes; and the structure and functions of the state as well as the law must be adapted to the fostering of the wellbeing of the whole society and not merely of isolated individuals or special classes. The primary object of law was hitherto taken to be the protection of life and property of the individual; now it was sought to be extended to include the just and fair distribution of the social amenities and advantages among all the members of the society. The principle of each man for himself was found to be theoretically untenable and ethically wrong. The individuals inside the society were feeling drawn towards each other to form social organisations for the amelioration of their condition as a class. Societies and nations were being brought into closer relations with each other by improved means of communication, brought forth by scientific invention and discovery overcoming distance and time, and by international commerce; and this growing sense of fellowship and solidarity between men was in fact universally expressing itself in the civilised world in the manifold forms of humanitarian activity for the help and relief of the sick, weak and downtrodden, and against slavery, sweating and truck systems, child labour, poverty, and other social and economic inequalities permitted or winked at by the law.[1] Solidarity and practicality were the most pronounced characteristics of the trend of the time and they bespoke a revolution in economics, ethics and jurisprudence and in all other social sciences.

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[1] For a sympathetic review of the anarchistic position, see Jethro Brown's Principles of Legislation, inroductory chapter.

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[1] See Jethro Brown's Underlying Principles of Legislation, Chapter II

With the greater fluidity of capital and property and the rising importance of individual credit (based on personality) in the social and commercial intercourse of man and the movement for the emancipation of the labouring class "property," hitherto taken as creating the legal status of man, yielded to "person;" and bare legal rights began to be subordinated to moral worth and justice. The individual's claim to the recognition (in law) of his moral worth and to a complete social and moral life was no longer subordinated to rigid insistence upon the property and contractual rights; and a social ethics was substituted for individualistic ethics based on egoistic utilitarianism.

Views regarding the object of Law vary in conformity with the prevalent idea as to the relation of the individual to the society.

I have, at the beginning of this lecture, described and compared the three successive stages of the conception of the relation of the individual to the society. These correspond to three stages or phases of the object of Law as conceived by those charged with its administration in society. In the first stage, it was the maintenance of social *status quo* with an uncritical submission of the individual to the settled order of society; while in the second stage Law was directed towards the securing of the maximum of self-assertion for the individual. In the third stage, *i e*, of socialisation of the individual, this self-assertion (*i.e.*, the property and contractual rights of the individual) was subordinated to the interests of the society with a scientific and philosophic appreciation and appraisement of the interests of both the individual and the society, considered not as adverse but as complimentary to each other. Jurisprudence was now regarded not as an independent science but as a branch of the social sciences.

The special features of modern juristic theories

The two special features of the modern theories of Jurisprudence since the advent of sociological ideas are:—(1) the departure of the older schools from the individualistic idea, which set the individual against the state and regarded Law as something which stood for the protection of individual against the autocracy of the government, to the sociological idea which looks upon Law as a creation of social forces for the interests of the society which are now recognised as identical with the true and real interests of the individual; and (2) the rise of various sub-divisions of thought due to the increasing complexity of the society and turning upon its particular aspects recently raised into prominence as important and necessary factors of social welfare and development.

The organic conception and the sociological spirit accepted and inbibed by both philosophical and scientific schools.

This sociological spirit which makes for the solidarity of the individuals and of the sciences was first introduced, as we have seen above, by the Organic conception of the society introduced by Schelling and Hegel and their followers of the Philosophic school of Jurisprudence. The later exponents of the German Historic School, *e.g.*, Puchta, also took up the organic idea and pronounced against the mechanical conception of society and law which regarded the state and the law as created by individual human wills; but with them the Organic idea had a metaphysical origin which somewhat discredited their pronouncements in the period of positivism that Comte introduced in Europe. The organic conception was, however, revived and established anew quite in a scientific spirit and method by another class of thinkers and writers including Comte himself which soon secured for it the universal acceptance of the civilised world.

The positive method of establishing the organic theory.

Some of the facts and arguments on which the positive method of disproving the mechanical and establishing the organic theory of society and Law rests are as follow[1]:—(1) No part of a mechanical aggregate, (*e.g* , a machine) is affected by its detachment from or incorporation into the aggregate; but in a living organism the parts depend for their vitality, health and development on their connection with the whole; and their separation from the organism is followed generally by decay and death, or, at all events, by radical modification of their original nature. The isolation of the individual from his society and his subsequent life, either apart from all society or after transplantation into another society are followed by decay, death, or radical changes so profoundly affecting his inner nature and characteristics, that this clearly indicates his organic connection with his original social evironments. (2) The existence of man in the state of nature prior to his social life which he is supposed to have created for himself by contract (according to the mechanical theory) is absolutely disproved by history. (3) Further, the assumption that man in the state of nature was endowed with all necessary mental equipments for the appreciation of the values of social life before he entered into the social contract is falsified by Psychology, which establishes that our intellectual and moral developments, even more than our physical, are dependent upon, and grow out of, our social environments. Such an assumption is based upon the logical error of attributing to the primitive man ideas, sentiments and aspirations for explaining the origin of those identical social institutions under the influence of which these ideas, sentiments and aspirations grew up.[1] Man is a speaking animal; but even his power of speech and language is the outcome of society or social life. (4) The facts gathered by the sociological researches as also the researches of the German historical school establish that all social developments everywhere take place along definite lines and according to fixed rules; a fact wholly inconsistent with the formation and development of every society and Law by the arbitrary will of the members of each. (5) The mechanical theory of life, as well as of the society, although it is a scientific advance made on the previous theories based on unscientific assumptions of supernatural agencies (being an attempt to explain vital and social phenomena with reference to the physical elements or parts of the objects themselves), is defective as it cannot adequately explain the peculiar vital characteristics such as growth, reparation, reproduction and adaptability to environments, decay and death.

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[1] See Korkunov Theory of Law, page 262 *et seq.*; Jethro Brown—The Underlying Principles of Modern Legislation.

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[1] See Maine, in dealing with the origin of the institution of property. Ancient Law, P. 254.

The vital theory of Bichat.

The biological principle of vital force, as distinct from the mechanical (physical or chemical forces), was scientifically demonstrated by Bichat just in the beginning of the 19th Century.[1] He opposed not only the mechanical but also the spiritistic theory, which, handled by the scholastics in obedience to the Biblical account,[2] and elaborated by the celebrated physician Stahl, explained life as a manifestation expressing itself through the inert body of matter under the influence of the force of the immaterial spirit lording over it.[1] The living organic matter, unlike the dead inorganic matter, has, according to this vital theory, in itself some special force and properties which are not permanent like the physical and chemical properties, but are temporary and transmissible. Armed with those forces and properties the living matter fights with the opposing natural forces, prevails upon them for a time and, when they are exhausted in the operation, they leave it and the organism dies.

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[1] General Anatomy, pub, 1801.

[2] The ancients like Plato, Aristotle, Hippocrates also had subscribed to this spiritistic doctrine

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[1] Note on the spiriticism of Stahl the great chemist (1660—1734) and the originator of the now exploded phlogistic theory in chemistry which prepared the way for the later theory of Bechat —

The earlier mechanical conception of society and the individual is substituted here by a spiritistic conception. The immaterial soul as distinct from the body, is neither denied, as by the materialists, nor is it assigned, as was done by the Cartesians including Spinoza and Leibnitz (who denied the possibility of any interaction between spirit, *i.e.*, mind, and matter), the position of a mere silent spectator of the automatic movements of the body , but is supposed as the invisible controller and guide of all its functions and movements. According to the mechanical conception, the body is an automatic machine ; acording to Stahl's spiritistic conception it is an inert mechanismn wholly moved and guided by the soul. Carried to the society as a whole, the society or state would, according to the former conception, be a huge machine like Hobbes' Leviathan, working automatically under the stress of the individual forces acting in concert, adjusted according to the compact or constitution (political conception) ; while according to Stahl it would be as a passive instrument guided and developed by the presiding spirit of the society as a whole, represented in the personal ruler, according to moral order and justice laid down by divine will and supported by temporal law for the purposes of the common social advance and perfection.

Bichat was, however, somewhat metaphysical in the development of his vital theory; and although his theory was followed up and adopted by Kant, Schelling and Hegel and received support from the conclusions of the Historical Jurists (to the effect that social institutions are growths) which were naturally more in symathy with and allied to it than with the older theories of life and society, yet the acceptance of this theory was not universal till the positivists supported it by science. Comte adopted the fundamental principle of Bichat's doctrine with modifications; and, while rejecting the antagonism preached by Bichat between physical and vital properties, admitted that the latter stood by themselves and could not be wholly reduced to or deduced from the physical and chemical properties of matter. In his Sociology he admitted the resemblance between vital and social phenomena, between organism and society, and here we find the first important position, after the doctrine of Law of Nature, in which the teaching of philosophy is accepted by empiricism and materialism in the name and in the interests of natural science and these two exhibit a tendency to approach each other for a common meeting place.

Similarities of society and organism.

The similarity of the society to the organism was superficially noticed at first by some (c.f. Schelling and Krause) to consist in the mutual correlation of the organic (*i.e.*, vital) as well as social phenomena, activities and functions,—the reciprocal interchange[1] of passive as well as active services between each part or member and the others as well as the whole, their mutual inter-dependence for their common life, welfare and development: and by others to consist in their external resemblance of structure which rendered possible the assimilation of the government, its various departments, the church and the masses of people in the society to the head and the various organs and the body of the living animal (cf. Bluntschli[2]) but the positive or scientific assimilation of the two was elaborably undertaken by Spencer (1820-1903) Schaffle (1831-93) and Lillienfeld who approached the subject from the point of view of the likeness of the phenomena and laws of organic and social life and especially of the laws of their "growth" or evolution. Here again, it must be admitted, that Philosophy led the way and Sciencefollowed to support the conclusions with its inductive proof. Schelling and Hegel were the great philosophers of evolution. The Historical school, as we have seen, combined scientific induction with metaphysical idealism when they adopted the evolutionary doctrine for building up the jurisprudence of their school. But Darwin and Lamarck gave a thoroughly

Successive contributions towards elucidation of the similarities.

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[1] "Bedingheit"

[2] Psychologie Studien uber Staat und Kirche, pub. 1841.

positivistic, naturalistic or scientific turn to the conception of evolution. Darwin's evolutionary theory of Biology was soon raised to a universal cosmic principle and applied by Spencer for the elucidation of his great philosophy of cosmic evolution; and Biological Sociology is its latest and greatest development. In estimating the precise relation in which the Sociological spirit and method of investigation stand to the Historical, I may remind you that the Historical school of law, while it contained, in the earlier stage, a double aspect, one metaphysical (borrowed from Schelling and Hegel,, and the other positive (inductive or scientific), latterly limited its programme to the scientific exposition of the phenomenal relativity of Law to the historical conditions and accidental social elements surrounding it. It reached a higher and more developed knowledge of this principle of relativity than was attained by its earliest exponents (c.f. Montesquieu [1]) in laying greater stress on the intrinsic than on the extrinsic conditions of positive law, *i.e.*, in recognising that Law is conditioned more intimately by the psychical state of the people than by the geophysical evironments, and in emphasising the need of studying Law in relation to the other forms of social life as interpenetrant with all elements

The relation of the Historical and Sociological schools.

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[1] Vecchio, however makes Vico an exception, see Formal bases of Law, Vol. X, Legal Philosophy series, P. 50.

of its activity aud culture. This idea of the historical jurists, *viz.*, the necessary correlation and interdependence of all social phenomena including Law led on, as I have said before, to Comte's conception of a unitary social science or Sociology which will be able to explain all of these different classes of phenomena by reference to analogous laws. Modern Biology discovered laws which also could be used to explain certain developments of social life ; and to Spencer is due the credit of clearly formulating the connection between biological and sociological research and transposing the laws of existence and growth, of adaptation to environment and of evolution, from the field of organic to that of super-organic or social facts.

Contributions of Biology to Sociological Jurisprudence.

The Sociological school thus contributed this new truth as to the nature of historical development of Law and other societary institutions *viz.*, that they are progressive adaptations of the human society as a super-organism to its evironment.[1] Society, according to Spencer, like the living organism, grows, differentiates in structure, develops a specialisation of functions through formation of different classes of men, multiplies by birth, *i.e.*, separates from its own substance parts capable of an independent life, and dies. He compares the individual members in a society with the different cells of the organism and the different classes of

Spencer : His scientific exposition of the organic theory of society.

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[1] See Vecchio—Formal bases of Law, p. 554.

men with the different organs (*e.g.*, the working classes are compared to the digestive organs and the ruling classes to the nerves). As in organic life, social growth takes place by the interior multiplication of cells already existing within the system as also by annexation of new cells from without, *i.e.*, by increasing complexity of the inner structure as also by annexation (*e.g.*, by conquest) of new provinces. The homogenious composition of early infant societies is gradually changed into a more complex organisation of specialised castes or social classes with special functions assigned to each, just as the simple cell of the lowest forms of life which performs all sorts of functions is evolved into the organised structure of the more advanced forms in animal life in which each organ has a separate function assigned to it. The nervous system itself, which controls the functions of the organs, is only one in the lower animals, governing both internal (*e.g.*, digestive, respiratory, etc.) as well as external (*e.g.*, those appertaining to the senses) organs and their functions; but in the higher animals it is differentiated into two co ordinate systems. In social organisms we likewise find civil and military administrations combined together and performed through the same machinery in primitive states and separated into two systems as the societies advance in civilization. The societies and states are often divided up into several independent states either amicably or by civil war or colonisation. This resembles the phenomena of segmentation and budding, multiplication and birth of the lower animals. Evolution of society thus, according to Spencer, takes place like that of the animal organism by a process of continued integration and differentiation.[1]

Minor differences among biological jurists.

There are some minor differences between these scientific exponents of the Organic theory of society which may be mentioned here. Lilienfield, for instance, regards not merely the ruling class but the entire population of the social group as constituting its nervous system and the other elements of the body sociale to be made up of the things possessed by the society, *e.g.*, its land, wealth, means of communication, etc. Then again, most of the upholders of the Organic theory lean towards socialism or the extension of the state's legislative and other powers and functions and the corresponding restriction of the individual,—a natural conclusion arising from the consideration of the fact of the complete subordination and dependence of the parts of an organism to the whole (see Schaffle); but Spencer, the English philosopher, true to his nationality and domicile, remained faithful to the individualistic doctrines and an advocate of free competition and extreme limitation of the state's social interference with the freedom of the individual. Many of these biological sociologists agree that society is a super-organism transcending, in the development and complexity of its structure, in the differentiation of its organs and variety of its functions, the vegetable and animal organisms[1] and regard the state merely as a type of social alliance. These two points, *viz.*, the differences (a) between society and natural organisms and (b) between the state and natural groupings of men through community of interests became, however, moot points of controversy among sociological thinkers and jurists, and these gave rise, as we shall see hereafter, to further developments of the science of Jurisprudence and legal philosophy.

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[1] See quotation from Spencer in the Evolution of Law series, Vol III.

Limitations of the organic theory.

The purely organic view and conception of society and laws would logically lend favour to certain juristic theories and discountenance others; and it is here that this theory, although it has made a decided advance in the right direction on the former mechanical conception, has been regarded as insufficient and incapable of further improvement and modification. For instance, the Organic theory of Law leads to a fatalistic view of things. The emphasis or importance attached by it to the organic spontaneity of all growth, the fixity of its direction and of its final form and end, and the futility of attempts towards changing or improving upon this spontaneous and fixed course of evolution by any conscious effort or direction from outside leads to the same practical conclusions as had been reached by the German Historical School as to the futility and mischievousness of legislation and codification against the grain of the society. Law must grow from the society spontaneously as the plant from the seed. It is all fixed beforehand; no use attempting to change it by human effort. The Organic theory of Law, like the Historical, regards Law as "found," and not made, and goes directly against the Analytical conception. It does not differentiate Law and Morals, like the Formal theory, as mutually exclusive of each other but regards them as complementary to, and co-ordinately related as "form" and "contents" with, each other; both working together as the social cement for furthering the common weal and the means of its development and perfection.

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[1] Schaffle—"Bau, und Leben" Vol I, P. 1, Spencer—Sociology, Ch. 1 quoted by Berolzheimer, p 218

The organic theory and the doctrine of evolution.

This fatalism, as a necessary concomitant of the Organic conception of society and Law, arises out of seeing behind all social movements the operation and influence of social (regarded as a special kind of natural) forces. When

Philosophy becomes positivistic and tries to seek explanation of social phenomena from their material external concomitants, just as we trace the cause of natural phenomena by looking for their antecedents, the resulting philosophy of law must be causal and fatalistic. Each natural phenomenon is taken as the resultant of the conditions preceding it and with these conditions as 'cause,' the phenomenon is bound to appear. This is true in all natural sciences, physical, chemical or biological. Law is a social phenomenon. It directly emanates by way of legislation, or judicial decision, from the king, or the legislature or the judges; and the Analytical theory, when it regards it as made, created by the will of the lawgiver, looks to the surface only, for it takes the spokesman of the law for its source, without caring to penetrate deeper into the real nature of the forces which influence and guide the organs of the state in the framing of the law. The Positive sociological jurists are not therefore content to accept the Analytical view of the law and its origin; but they take it as a social phenomenon produced by the legislative or judicial organs of the state passively under the influence of the deeper social forces. Legislatures, judges, and kings are mere mouthpieces or spokesmen of the law; the real causes are the dominant forces in the society. They differ in their estimate of these dominant forces but are agreed that they are natural and are not dependant on individual volition. As regarded by these positivists the development or growth of Law is organic and biological and not mechanical; but that does not make it more amenable to the freewill of man. In fact "freewill" itself is denied by positivism: it is a self-deception under which we labour under a superficial view of things. The natural forces, which guide our will through motives, are ignored by mistake; and the motives, naturally arising out of the organic constitution of man and the environments and their operation and independently of our will, are mistakenly supposed to have originated directly from us, created and guided by our free will.

The two sides of the theory of evolution.

The doctrine of evolution has two sides or forms. The one, purely inductive and positivistic, is the first and cruder form of the doctrine. It is merely the doctrine of organic growth along pre-established lines for a predetermined end. It is a causal and fatalistic conception, and teleology or purpose (apart from the absolute, divine or natural purpose inherent in the nature of the growing organism) has no place in it. Evolution according to this view is a blind naturalistic process accompanying or arising out of the struggle of the individual, species, or clan for existence as against others. Fitness to survive arises naturally out of this struggle by the natural elements and the crushing out of the weak and unfit. In society, Law is the expression of the forces which are for the time being dominant in this social struggle and kings, legislators and judges are the organs for the expression of these dominant forces.

Evolution of Law as conceived in philosophy and positivism distinguished.

The deductive philosophical evolutionists, (Schelling, Hegel, Krause and their followers) as also the German Historical School regard evolution as a fixed process of growth and development arising out of the nature either of the absolute identity (Schelling) which is the metaphysical *prius* of both mind and matter, or of the absolute idea or thought (Hegel) of which matter is the logical counterpart, or of the popular genius or spirit (Historical School.) There is this difference between this philosophical theory of evolution and its naturalistic rendering by the positivists that the former takes a more comprehensive view of the final end of the cosmic process and regards it as a perennial movement towards self-realisation of the individual, which, as it progresses, makes for the supremacy of the ego or free-will over its opposing environments and thus lets in teleology or purposive self-directed development to have its proper place in the later stages of the advance. We shall see hereafter that Sociological Jurisprudence which traced its descent from positivism gradually departed from the early, naturalistic, biological conception of evolution and came to favour the view that purposive advance of society and law was not only an integral part of the process, but that, as society and law make progress in civilisation, their evolution becomes less and less natural or fatalistic and more and more conscious, self-directed and purposive (teleological).

In real evolution the species itself changes.

In the growth of a plant or an animal from the seed or the embryo, the natural forces immanent in the seed or the embryo work out their preordained end (*viz.* the formation of the full-grown individual belonging to a certain species) in the pre-established way. There is no change either in the end itself (*i.e.*, the species), or in the process of its gradual realisation. This is not real evolution as Darwin understood it. In evolution the species itself changes. The naturalistic theory would ascribe even this change to the struggle for existence and natural selection (for the survival of the fittest) by which the species is gradually endowed with organs and faculties which render it more capable to live and maintain itself against the opposing forces of nature. Thus the final end or product itself gradually becomes somewhat improved from what it was before. In each society the popular consciousness genius or spirit has, according to the German Historic School, some dimly conceived end

Defects of the organic theory of the Historic School and the early positivists.

towards which its development tends. This end or purpose is fixed and the development of law must take its direction from that immanent tendency and final goal. This is the pure organic conception which does not recognise any possibility of real evolution. Why should not the society, in its intercourse and struggle with others of more advanced types, see better and modify its purposes and objects and mission? Why should the popular spirit remain unchanged and unaffected by its constantly changing internal and external environments, increase of knowledge, commerce and power?

The annihilation of the individual.

Lastly, the organic theory, as originally conceived by the positivists, wholly merged the individual in the society. This position was, in fact, the opposite extreme of what was asserted by the mechanical theory, *viz.*, the subjection of the society to the individual. The latter regarded the society and the state as created by the will of the individual for his own ends; and their existence was justified in so far as they served those ends. The former, on the other hand, looks to the individual as a subordinate part of the social organism—as a mere product and a means Spencer pointed out that as societies develop, like individual organisms, from simple and homogeneous beginnings into more complex and differentiated structures the mutual dependence of their constituent elements (the individuals and classes) constantly increases; while the whole body (the society as a whole) becomes more independent of the units of which it is composed. The philosophical jurists saw deeper and more distant truths, when they, of course with their metaphysical and deductive method of reasoning, asserted that in the perfection of the society or community lies the perfection and self-realisation of the individual. The free ego is realised in the free community. The completest merger of the individual in the society, which, looked at from the positivist point of view, spells annihilation of his independent existence as individual, is, according to the philosophic view, really to be realised by the completest co-ordination of the two; for the merger is effected by the cessation of all opposition between them—merger or unity of their *interests* which cease to be opposed to each other, so that the individual attains his highest freedom and individuality helped therein by the society as a whole in all particulars.[1]

Evolution of the organic theory in sociological jurisprudence

We shall see, in the next lecture, how the Organic theory, with which the positivist sociologists began to reconstuct the social and legal sciences, itself evolved and tended to coincide with and scientifically support the conclusions of the philosophers. Spencer, Schaffle and others —while they admitted that social groops, in comparison with animal bodies, were organisms of a superior type (super-organisms)—did not fully draw out the legitimate inferences which that admission involved ; and the course of development of Sociological jurisprudence was based on the careful examination of the special characteristics of this super-organism. We shall see that all the previous juristic theories of the different schools had to be reconstituted in the light of this revolutionised conception of organic relationship of the individual and the society ; and, in the course of this reconstruction, they tended to approach each other and form as it were an organic whole—an organic society of theories—wherein the theories, without losing their individuality, mutually correlated and complemented each other to serve the common purpose of building up the perfected jurisprudence of the twentieth century.

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[1] See Lecture III, (Hegel).

PART III.

THE

Sociological Theories.

LECTURE VI.

THE SOCIOLOGICAL THEORIES OF JURISPRUDENCE (SCIENTIFIC THEORIES.)

Inadequacy of older theories.

The Sociological juristic theories came to thrive at the close of the 19th and the beginning of the 20th century as a result of the social and economic necessities of the times for which the older theories were found to be inadequate. The orthodox theories of the 17th and 18th centuries secured their fund of juristic principles either philosophically, from the elements of man's reasonable nature,[1] or empirically, by gathering them from the matured legal systems of Rome and England.[2] These formed, what to them appeared to be, a perfect set of juridical rules which it was the duty of the rulers to administer and enforce as positive law. Even when the Analytical School gave up speculations as to the Law of Nature and formally protested against it and satisfied itself with the pure theory of the Law as an arbitrary creation of the sovereign, the idea still prevailed that the existing fund of legal principles of Common

The Analytical theory and the imperative view of Law.

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[1] *e.g.*, the Rationalistic or Law of Nature Schools.

[2] Maine shrewdly observes that the principles of Eng. Equity, supposed to have been evolved by the early ecclesiastical Chancellers out of the King's conscience, as well as the hidden principles of unwritten Eng. Common Law, discovered and laid down by the early Common Law Judges, were really drawn to a great extent from the principles of Roman Law. See Ancient Law, pp. 33, 44.

Law and Equity, stored up in the pages of the Law Reports, together with the Statutes and the customs of the realm (adopted and recognised as positive law by the sovereign) was the ideal Law and that no positive or wide departure from it would be justified or possible except by a deleberate Act of the Legislature under some special and pressing local or circumstantial necessity. The imperative view of law, countenanced, chiefly in England and America, by the Analytical School, and founded on a mechanical conception of society, hardly supplied any workable test of the proper contents of the law for the guidance of legislators and judges except that of egoistic utility,[1] which, as we have seen, became allied, in the early part of the 19th century, to the classical school of economics and encouraged, in obedience to the individualistic temperament and constitutional passion for liberty of the English race, a policy of non-intervention in legislation and administration of justice. In the matter of free contractual liabilities of individuals, the policy really worked, under the economic conditions of machine industry, in the interests of the economically stronger classes and meant the destruction of the weaker and poorer labourers. In the name of a theoretically perfect ideal of individual liberty of contract for each and all, this policy was working the highest material injustice. English legislators and judges, in their conservatism characteristic of the race, joined in the working and administration of an alleged theoretically perfect legal system, the former seldom caring to make new laws which would curtail the individual's liberty of contract, and the latter bent upon administering in concrete cases no rules except those which were contained in, or would be logically deduced from, the general principles enunciated in the statutes or precedents. Equity itself had by this time been as much stereotyped and incapable of expansion as the Common Law[1] and there was very little scope left for further indirect (judicial) legislation. The theory which holds that the law and its changes are and must be voluntarily made by the sovereign and his delegates, and that they are not spontaneous growths, naturally did not suit the requirements of the growing society, especially when, as in the latter part of the 19th century, each concrete case calling for justice was likely to present some novel situation and circumstances not contemplated and covered by the pre-existing rules and principles, and when persons in charge of legislation and adjudication were unwilling to indulge in the promulgation of new principles which were likely to clash with their pre-conceived abstract ideals of free individuality in person, property and contract. Sir Henry Sumner Maine summarised the growth of individualism in progressive societies as one from status to contract.[1] The exigencies of the times demanded a move in the contrary direction which was opposed to the individualism of the 17th, 18th and early 19th centuries.

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[1] Maine deprecates the theory of utility as the expression of a mere truism, Ancient Law, Ch. IV.

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[1] See Maine—Ancient Law, Ch. III, p. 69, and Holland—Jurisprudence, Ch. V.

The Formal theory.

The Formal theory of Jurisprudence, advocated in the continent, likewise stood for the maximum individual liberty and minimum legislation. According to this theory as well, Law is made by the temporal ruler and sustained by his force and coercion; only that it should conform to the canon of individual liberty deduced from the nature of reason. Being more abstract than the Analytical Theory, it was still less adaptable to the administration of material justice; and its rigid differentiation of Law and morals, more pronounced than even that of the Analytical theory, made it obnoxious to the demands of social ethics for the protection and improvement of the weaker classes. Any theory of law, however profound and thoughtful, which proceeds upon some abstract and rigid preconceived principle or ideal of right and justice and admits only of a process of deduction therefrom for the formulation of particular rules for particular cases, without the consideration of the peculiar advantages or disadvantages of the parties or of the effect of their general application on the class to which the parties belong or on the society, would stand condemned in those days when the necessity for such consideration was becoming keener and more acutely felt than ever before.

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[1] Ancient Law, Ch. V, p. 170.

The Historical, Metaphysical and Organic theories.

The Historical theory as well as the Metaphysical and Organic theories were also found to be unworkable in spite of their admission that law can not be stationery but must grow with the times. The Historical theory set rigid limits within which the growth is to take place, indicated by a pre-supposition of the nature of the popular genius or spirit ; and the Metaphysical Schools regarded it as a strictly dialectic or logical process determined by the nature of the absolute reality as conceived by their philosophy. They were in advance of the Analytical and Formal theories in so far as they recognised the fact and principle of growth in society and law ; but the defect lay in their looking upon growth not as a real evolutionary process but as something like a biological process, along lines already rigidly fixed and defined, from which no deviation was possible. By holding that the growth itself is capable of calculation, both as to direction and extent, like the movement of celestial bodies, their theory of growth

Assumption of a complete fund of legal principles in all earlier juristic theories.

The common defect of these theories.

became as much in effect a mechanical-deductive theory as the older static theories of jurisprudence[1]. Thus, from different directions and with different methods, all of these pre-existing theories went to form, each in its own way, a "jurisprudence of conceptions" which aspired to have secured a final and complete fund of legal or juristic rules and principles which would provide for all possible future cases requiring juridical settlement. The German jurists of the Historical School had such a fund in the classical jurisprudence of Rome supplemented, where necessary, by the principles of Germanic customary law; those of the philosophical school had it in their Natural law (of the 17th and 18th centuries) or in their "philosophic bases of positive law," the "canons of 'liberty' or 'reason' or 'harmonious development" (the more modern forms of Law of Nature) of the 19th century. Concrete rules for all possible cases were presumed to be capable of deduction by each school from its appropriate fund by something like a mechanical method of syllogistic reasoning. The English and American jurists had such a fund in the principles of common law and equity stored up in their law reports. The common deficiency of all these theorists consisted in their insufficient consideration of the fact that the practical individual and social needs of life are of infinite variety and no preconceived set of principles can provide for them all. These needs grow more complex as the society grows, and the growth itself is not strictly logical; and hence the process of deduction from a stereotyped fund of legal principles in the administration of justice hopelessly fails in the actual affairs of life, and the result is material injustice in most cases in the name, and under the authority, of a crabbed, effete and worn out system of law and formal theoretical justice. The Law of Nature Schools wanted to set up a code, the Historical School a body of case law,[1] and the Analytical school a stock of principles embodied in both statute and case-law and insisted upon each administered rule of law to justify itself by its affiliation to the parent stock; and thus they all came into conflict with the modern practical tendency which stands at the root of the sociological schools and wants the validity of each legal rule to be tested not with reference to pre-existing principles but to the ends to be subserved by it, *i.e.*, the quality of the effect it will produce on the interests of the individual and the society.

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[1] *e. g.* The Law of Nature, Formal and Analytical theories.

The modern tendency.

The paramount necessity that called for a reconstruction of social, political and juristic

Necessity of sociological jurisprudence

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[1] And the principles of Roman Law.

theories was thus intimately connected with the stern realities of life—the great and urgent need of readjusting social arrangements to meet the new situations caused by rapid, and even revolutionary, changes in the world of economics through the developments of modern science. The countries of the world were now closely knitted together by improved and new means of communication, invented by science, and the new situations demanding solution attracted attention throughout the civilised world. Modern science was chiefly responsible for these situations,[1] and it naturally brought to bear all its resources on the discovery of the correct juristic theories that would successfully grapple them. The efforts of the greatest intellects of recent times in this direction, so far as they bear upon the sociological reconstruction of jurisprudence, are marked by some prominent characteristics. The first relates to the sociological method of enquiry, the second to the sociological object or end, and the third to the sociological means for the attainment of this object or end of jurisprudence.

Its method object and means

(1) The sociological method implies a wider range of investigation of the facts and laws of societies, ancient and modern, and of all degrees and stages of civilisation, with a view

The sociological method—Comparative jurisprudence.

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[1] *e g.*, by revolutionising commerce and industries.

to secure a sounder scientific basis and theory of social life than had hitherto been attained. Indeed, here we enter into a stage of comparative social sciences, including comparative jurisprudence, history, linguistics and religion. The study was no longer limited to the comparative study of English Common Law and the Roman Law as was done by the older Analytical jurists, or to that of the Roman Law and the ancient Germanic institutions and their subsequent developments which had satisfied the German Historical School, but was extended to the social history of all Aryan peoples. It even enriched its data by the maturest results of Ethnological and Anthropological researches regarding the nature and laws of human society and race evolution. Comparative jurisprudence thus became the broadened form of the older Historical Jurisprudence based on more advanced scientific principles. With gradually widening outlook and field of enquiry, it soon developed into the Ethnological and Anthropological Jurisprudence and contributed its rich materials to the main science of Sociology and Sociological jurisprudence.

The sociological end or object.

(2) The second, *i.e.*, the sociological conception of the end or object of jurisprudence implies a transference of attention, in social sciences and jurisprudence, from abstract liberties and rights of the individuals to the purposes and interests which they serve or

protect. A social group is now studied, not as a mere collection of individuals, but as representing an interest for which they have united together. Several classes or groups inside a society are thus held and regarded as representing several or distinct interests whose complementary or adverse character with reference to each other marks the sympathy or hostility of the groups. Interests themselves thus come to be classified as appertaining to the individual, or to his class, or to the society as a whole. This attitude of sociological jurisprudence is also explained by the necessity which, as explained above, gave rise to it,—the practical necessity of adjusting the conflicting interests of individuals and classes,—which demanded that juristic enquiry into social matters should look, beyond the mere will of the individuals to associate together, to the interests and purposes that supplied motives to their will to enter into and maintain an associated life.

Vecchio's summary.

In describing the above characteristics of the sociological school, Prof. Del Vecchio observes :—" The historical analysis of Law was accompanied by a great extension in research of which it was both the cause and effect. Different times and nations were studied which up to that time had escaped examination because they were thought unworthy of it. The comparison of the legal institutions of various peoples grew so rapidly that juridical ethnology is now considered a distinct science. Its vast design is far from being fully realised, but still it is undeniable that the comparative study of the various races, especially in their first stages of juridical development, has thrown no little light upon the genesis and later development of law. Comparative philology greatly helped discoveries of prehistoric juridical facts (especially in the splendid work done by Leist). Even more important, in its consideration of the intrinsic coefficients of law, was the aid of economic studies which, in giving rise to the discussion of method, bore rich fruit. The conflux of these various currents necessarily resulted in partial contradiction, since the different starting points were necessarily reflected in the final conclusions concerning the same subject. It is not surprising that those who, following Darwin and Spencer, took a biological point of view of human society gave its organic conception an exclusive and perhaps erroneous meaning. This also explains, if it does not justify, the excessive predominance given by the economic school to the economic element in the determination of social structures."[1]

Sociological conception and means.

(3). As an outcome of the above characteristics and tendencies, and growing out of the same prime necessity, there was a gradual development of sociological thought marked by the remoulding of the organic conception of society. Society came now to be regarded as a super-organic or a psychological unit or body, because it presented features not capable of explanation by the organic conception. In the first stage, the outcry led by the Marxian socialists was directed against the extreme partiality of the governments and laws to protect and preserve the *status quo* of the individuals and classes regarding their freedom of personal activity and enterprise (including contracts), even if such freedom, under the altered industrial conditions, resulted in widespread injury to the bulk of the society. Social interest was, at this stage, identified[1] with the interest of the majority ; and, under the influence of the organic theory of society, the interests of the individuals, *i.e.*, of the minority, were sought to be sacrified for the interests of the masses.

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[1] Formal bases of Law. Legal Phil. Series, Vol. X, pp. 54, 55.

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It gradually dawned upon the sociological thinkers that the very existence of diverse independent and even clashing interests of the different parts of the society, *i.e.*, the antagonism of the interests of individuals or minorities and those of the bulk, majority, or the whole, indicated some difference between social and biological constitutions, and that the organic doctrine of the wholesale merger of the individual in the society required to be revised. Moreover, the growing importance of the interests and purposes of life and liberty, and the growing demand for intelligent and deliberate efforts for the reconstitution of society for the better provision and protection of these interests, and also the practical utility and benefit of such efforts proved by the recent social legislations called for a scientific theory of society such as would justify such efforts and establish their possibility of success better than the organic theory which relegated individuals and societies to the position (as respectively the parts and wholes, without any possibility of conflict between them, of an organic entity) of mere passive products of naturalistic, biological or evolutionary processes and forces. The psychic element in man and human society was thus brought into prominence for distinguishing them from vegetable and animal organisms; and the successful use made of it by men, singly as well as in groups, to rise superior to the social and other opposing environments was pointed out to establish and support the new scientific view that the individual was more than a mere product or limb of the society in which he lives. Ethnological and Anthropological sciences gave rise to race psychology; and the latter freed sociology and jurisprudence from the shackles of the pure organic theory and lent scientific support to the social utilitarianism of an improved type by which social interests, instead of being allowed to override individual interests in all cases and respects, were required to be balanced, as tought by Jhering, with individual interests in every case for the purpose of finding out the true practical adjustment that would produce the best practical results.

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[1] *i.e.*, by the Marxian theory.

Leaders of juristic thought and movements.

It is often seen that great and fundamental changes in the world of thought are first adumbrated by some great leader whose first vigorous sketches of the new lines of study and thought awaken others to follow up the indicated lines more elaborately and thoroughly. Each of these new lines of thought is now taken up by new men, sometimes singly, sometimes in conjunction by many, and made the subject of special research till fresh results, more advanced, scientific or philosophical, are reached which were imperfectly realised by the master. Socrates, Plato and Aristotle were such leaders or masters of thought in ancient Europe ; and each, as we have seen, had been followed up-by others along lines pre-indicated by them. Grotius, Descartes, Bacon, Hobbes, Kant, Savigny, Schelling and Hegel were in their turn such leaders of new thoughts and juridical, scientific, or philosophical movements in the 17th, 18th and 19th centuries. Comte, Spencer and Jhering may be taken as masters, in a similar sense, of the new sociological thought, and the last, as the jurist who ushered in the new sociological jurisprudence of the closing 19th century—the century that had seen so many unprecedented advances and revolutions in science, commerce, industry and politics. In Jhering, we find all the above characteristics, of sociological jurisprudence, combined in his presentation of the new sociological view of Law, its means and ends. I shall first summarise his conclusions and then separately discuss the principal traits of sociological jurisprudence as sketched by him and as developed by others, contemporaneously with him and afterwards.

Jhering's genius for juristic conclusions.

Jhering was neither a great philosopher like Kohler, nor a great biologist or ethnologist like Spencer or Poste, nor a great psychologist like Tarde or Ward; but most of his teachings, backed by the strongest common sense and innate aptitude, amounting to genius, for recognising justice, and unique sociological insight as to the true position and nature of the individual in his relations to the society, have a catching eloquence of easy perspicacity and a genuine ring of truth, carrying conviction, which we seldom find in the more elaborate and laboured efforts of those who came after him. Nowadays, a tendency has arisen to measure the value of a conclusion by the statistics, labour and effort by which it has been reached and supported; and the lay reader is often disappointed by an almost unending parade of research and effort followed by what seems to be a paltry conclusion, which again, unless it repeats a commonplace truism, is often either unconvincing, or useless on account of its hesitating and conditional formulation and limitations. Statistics and research are good in their way ; but they are useless if there is no genius for conclusions (which is philosophy) behind them. The truth of the conclusion is not to be lesser than the materials but must rise higher than them in its generalisation. Modern science has yet to realise that induction is truly fruitful when there is true imagination, philosophy or genius to handle it. Jhering had such a philosophy though he had not the abstruse and laboured philosophy of the post-Hegelians. Besides, he had his comparative and ethnological jurisprudence and sociology, though not the improved schemes, methods and and statistics of the professed twentieth-century scientists who exhaust themselves as well as the patience of their readers in displaying their weapons and proving that they are terrific ; but they mostly lie buried under the weight of these weapons, for the genius or strength to use them is wanting.

His social utilitarianism.

Jhering (1818-1892) was a social utilitarian. He waged war against the German Historical School and opposed their position that Law is unchangeable except by way of peaceful spontaneous growth. The development of

Law, he maintains, is, like its origin, neither spontaneous nor peaceful. It is the result of constant struggle or conflict with a view to attain peace and order. It is, besides, very often deliberate. The theory of spontaneous growth stands refuted by the growing and successful legislations, for instance, in Germany and in England ; and those legislations were based on *purpose or utility*. Jhering's utilitarianism is, however, unlike Bentham's or Austin's, not individualistic but social or sociological. It is a mistake to deal with human affairs, acts and institutions, as facts of external nature : for the former are all directed to a purpose or *future end* and are means to such ends, whereas the latter are wholly and blindly subject to *causal* or antecedent conditions. Jhering also controverts the Kantian position, that the sense of right and justice or category of abstract reason, innate in man, shapes the legal system ; but insists that laws are framed for some practical material object, end or purpose suited to serve the interests of the society for which they are intended. Prof. Roscoe Pound says, " Whereas the philosophical jurist, adopting an ideological interpretation of legal history, considered that principles of justice and right are discovered (*a priori*) and expressed in rules, and the historical jurist tought that principles of justice are found by experience and developed into rules, Jhering held that means of serving human ends are discovered and fashioned consciously into laws."[1] The Philosophical and Historical as well as the English Analytical Schools were equally growing academic; and their jurisprudence, each in its own way, became one of "conceptions," out of touch with the actual realities of life. They were respectively pressing either (a) some *a priori* theories of right and justice derived from categories or canons of abstract liberty, or self-realisation of the ego, or the absolute; or (b) deductions from principles of the ancient Roman Law or Germanic institutions laboriously collected by historical and comparative investigation; or (c) the time-honoured rules and principles of the English Common Law;—on the assumption that they were perfect, without testing them by the results of their practical application in the present state of the society or their suitability to its present requirements.

Jhering's doctrine of interests.

Jhering's practical realism led him to lay down his celebrated doctrine of interests. Himself a great Romanist and comparative jurist, he traced the development of the actual methods of Law and administration of justice and found that, in the earliest stages, Law substituted private revenge (for wrongs) by granting actions to the injured parties. The conception of legal rights evolved afterwards by generalisations from these actions allowed by Law. Persons to whom the law granted actions for injuries were supposed to have rights; and actions came to be recognised as mere means of vindicating these rights. Legal theory thus advanced backward, beginning with the actions which lie on the surface and proceeding towards the rights which are logically antecedent to their remedies in action. Further analysis and quest for the logical foundations of things would disclose that legal rights are, in their turn, merely means conferred by Law for securing and protecting interests which it recognised as deserving its support. By this theory of interests Jhering gave a death blow to the formal and individualistic conceptions of Law, held alike by most of the former schools,[1] which limited the function of Law to the fixing of a social order which will guarantee, to each individual, the largest sphere of free activity commensurate with similar spheres of free activity of others. The older theories regarded Law as a mere formal system fulfilling its mission merely by providing security and liberty of activity for the individual without any concern for the subjects, needs, aspirations or moral worth of the individual activities. By the importance attached to the wills of

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[1] Scope and progress of sociological jurisprudence, 24 Har. L. Rev. p. 141.

Historical evolution, in order of sequence, of the legal ideas of 'actions,' 'rights' and 'interests.'

The opposite logical order of 'interests,' 'rights' and 'actions.'

Abandonment of the conception of Law as 'delimitation of individual wills.'

Corollaries of the older conception.

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[1] See Kant, Savigny and Puchta quoted by Roscoe Pound in 24 Harv. L Review, p. 143.

individuals, they moreover emphasised the idea that the individuals in society are, as isolated self-contained units, bent upon treading on one another's heels ; and that the rulers and persons in authority are naturally inclined to encroach upon individual freedom, by misuse of power, for purposes of self-aggrandisement. It thus became necessary to oppose the individual and his rights to the society, and to conceive the function and business of Law to be the negative one of protecting each individual against the trespass of his fellow subjects or of the rulers.

Corollaries of of the new conception introduced by Jhering.

Jhering, however, assigned to Law, by his new doctrine, a practical sphere of usefulness. and besides converted it into a sociological institution, growing and developing with the society and the immense variety of interests represented and subserved by its various sections.

(a). The function of Law according to the new doctrine.

Law, as tought by Jhering, has to take note of the various interests valued in a society, to estimate their respective worth and importance, follow their historic progress and changes from time to time, and shape itself so as to best suit their protection in the present, and co-ordinated furtherance in the future, with due regard to their character and value.

(b). The individual becomes a social unit, through the interests which he represents.

The individual thus comes under the cognisance of Law only through or on account of the interests which he represents and consequently acquires a social character, *i.e.*, the character of a social product ; for all interests are manifestly the outcome of social conditions and are realised only in and through the society. No abstract apriori scheme or code of legal rules can, in this view, be deductively evolved from a supposed universal concept of human nature, reason or liberty, for human interests are not uniform. They are often antagonistic, and vary indefinitely with different persons and circumstances.

Korkunov's defence of Jhering's doctrine.

Prof. Korkunov supports Jhering's 'theory of interests' as against the 'theory of (protection of) wills (liberty)' by pointing out, (1) that laws do not enforce all contracts but only those that represent interests which are regarded, on account of their importance and moral worth, as worthy of protection ; (2) that even persons with no wills, *e.g.*, idiots, insane persons, and even unborn infants, are invested with legal rights ; (3) that interests of persons are often protected by Law even against their wills, as in the case of minors and spend-thrifts ; so that laws often have objects other than the protection of wills ; but there is no law which does not, directly or indirectly, protect interests ; and (4) that Law often creates and protects rights and interests which are not attached to individuals but to groups or classes of men (*e.g.*, corporations), who may have common interests but can not, without the help of fiction, be said to have a will which belongs only to single individuals.[1]

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[1] Theory of Law—pp. 110-111.

Jhering's social utilitarianism.

Jhering makes clear his social utilitarianism by establishing that egoism or self-interest itself is furthered by enlisting the interests of others in its service. Sometimes, there is a natural co-operation of the interests of many people, *e.g.*, inside a family. In the majority of cases, however, there is a conflict, and accordingly they have to be combined artificially ; *e.g.*, where a master engages a servant in his work on payment of wages. All communal purposes and social ends are thus participated in by individuals through their self-interests being, naturally or artificially, united with the general purpose or end. The most general and organised purposes of the state are similarly socialised, and the individuals are made to participate in them, by the "lever of interest" devised by Law. Law's sanctions serve a good deal to make the individuals perceive that it is to their interest to be socialised, as willing co-operators, for furthering the common social ends, when otherwise, *i.e.*, in the absence of such sanctions, they would fail to see their usefulness to themselves as individuals, or would consider it to be too remote to call for voluntary and active co-operation. Social activities in furtherance of general social interests are undertaken by individuals through the appeal either to their self-interest, in the shape of reward, wages or punishment, or to their sense or feeling, of service, duty, sympathy or altruism, which

The lever of interest supplied by legal sanctions.

leads to self-denial and is embodied in the precept " I exist for the world." Interest includes everything conducive to physical well-being, such as liberty, wealth, health, property, family, &c. ; and Law, by its protection and security of these interests, is conducive to self-interest. As civilisation advances, the individuals get more and more socialised by the rise of the ethical feeling along with the increase of knowledge and appreciation of the value and interest subsisting in the social ends. They become more and more alive to the fact of their mutual dependence in society for the sake of their individual as well as common interests, and more and more knitted together by the lever of interests, in the shape of compensation, reward or punishment, supervised and enforced by Law as well as by the ethical feeling for the common purposes and undertakings, like trade and public and social duties. They feel that they can accomplish more towards the attainment of interests when they co-operate together than by single-handed effort.

Socialisation of individuals through growth of knowledge and ethical ideas as well as by the lever of interest supplied by Law.

So, according to Jhering, social purposes, ends, or interests are larger and higher than individual interests ; for while individual interests are antagonistic to each other, social interests support and help the realisation of the individual interests. Law is the chief means, supported by the forces and coercion of the state, to prevent conflict of interests and for the furtherance of the social ends. Society has other means as well, for these socialising ends, to secure co-operation of individuals and the restoration of balance, in case of economic or other disturbances leading to want of equilibrium and solidarity, like compensation, reward, wages of all kinds in money, kind, or honour—the *quid pro qui* of exchange, competition keeping down price, &c.; but Law, vested with coercion which is the monopoly of the State, is the chief means to these ends. Society and State are thus distinguished; and Law and its co-ercion and the organisation of the government are the characteristics distinguishing the State from the Society. Law (and its co-ercion) supports the lever of interest (material and ethical) naturally subsisting in the society. Society, based on interest, may extend beyond the geographical limits of the state organisation.

State and society compared

Law as means to social ends: the doctrine of purpose

Jhering's doctrine of purpose which proposes to test Law by its social ends is a thoroughgoing doctrine of reform. It would not take lying down the Law and its slow and circuitous spontaneous development as inevitable, like the Historical school. It regards Law as capable of being deliberately and intelligently shaped and adjusted, as it should be, for social purposes and recognises its distinctive characteristic of co-ercion as well as its origin in the state. This view therefore is not

Law is made not found.

fatalistic but more practical, and encourages the Imperative theory of Law of the Analytical jurists. The theories of Norms, of Binding, Bierling and others, no doubt received much of their inspiration from Jhering.

Rescoe Pound on Jhering.

In this connection I may usefully quote Prof Roscoe Pound's remarks about Jhering, "To one who thinks of Society as recognising interests and creating rights to secure them Law is very likely to be made rather than found. We should expect him therefore to construct an Analytical if not an Imperative theory Accordingly, though the rise of legislation in Germany under the Empire has no doubt contributed, the influence of Jhering's teleological method is to be seen in the prevalence, in recent German thought, of many of the characteristics and much controverted doctrines of the Analytical School. Many ideas of which we think as distinctly Austinian have come to be common-places in the newer literature. Thus it is held necessary to discuss whether public law is really law, to argue whether and how far international law is law, to point out that customary law obtains its authority from the state, some even laying down Austin's doctrine of tacit command, and to insist that whatever agencies may formulate legal rules they obtain their legal character from the state. This Analytical bent is especially marked in the Social Utilitarians and in the works on the

Revival of Austinian ideas.

general theory of Law (Allgemeine Rechtslehre) in which the influence of Jhering has been stronger than in those upon the philosophy of Law. In Austin's case there was an obvious connexion between his theories and the legislative reform movement which was before his eyes as he wrote. Similarly in Jhering's case the relation of his theories to the reform movement that led to the downfall of the Romanists of the Historical school is sufficiently clear. Those who feel strongly the need of thoroughgoing reform are likely always to take an imperative position, since their hope lies in legislation. Usually it is only by procuring an authoritative expression of the will of the community that they may expect to establish their ideas in the legal system of the present."

Jhering's theory of crimes and punishment.

Jhering's theory of crimes and punishment is also characterised by his general theory of Law. Law being meant for social security and ends, and crime a menace to the conditions of existence of society, that Law requires it to be prevented by punishment. Punishment therefore should be looked upon and fixed as 'Lweckstrafe,' *i.e.*, as a means to social ends with an eye to the future and not as (as held by Kant or Hegel) "Vergeltung-strafe," *i e.*, as retributive or compensatory of the wrong done in the past. Punishment is hence to be adjusted not to the nature of the crime but to the nature of the criminal—not to the specific action, but to the abstract menace to the society arising out of all that type of acts. Its severity should be graded in proportion to the magnitude of the social advantage expected to arise therefrom or of the social injury or danger expected to be removed or prevented. The real menace arises not from specific criminal acts but from the criminal disposition of men leading to repetition of such acts. Hence in punishing the man or his criminal disposition (and not the crime) with a view to his or its correction, we must find out the degree of culpability out of which the act resulted and not the act itself. The menace to society arising out of the crime is two-fold—objective and subjective; *i.e.*, it depends on the value of the social possession or interest assailed by the crime and the degree and kind of the unsocial disposition of the individual of which it is the index and evidence; and punishment must have a regard for both.

Summary ot Jhering's services.

Jhering was an investigator of ancient law, especially Roman Law, of the highest order (*vide* his Geist des Romischen Rechts, &c. pub. 1852, 1858). He was a great critic and rival of Savigny's pre-eminent scholarship in that department, and a comparative jurist, philologist and ethnologist (as his posthumous works, *e.g.*, Vergeschishte der Indo-European and Entwis Kelungs geschichn des Romischen rechte, would show). His juristic use of the doctrine of interest; his comparison of egoistic interests, utilised as 'lever' or motives of social activity in the shape of reward and force (co-ercion of law and public sentiment), and the social motives of sacrifice, duty and love; and his analytic idea of Law as moving progressively from consciousness of ends clearly indicate the psychological trend of his jurisprudence. He fought alike against the eternal unprogressive Natural Law and the abstract deductive legal philosophy of the rational and idealistic schools as also against the national jurisprudence of the Historical School. He simultaneously sought for the ***universal theory*** of law which will be ***conversant with the practical purposes*** of life[1]; and, lastly, he fought for social purposes, seeing in them the fruition of individual purposes (***per contra*** the Analytical school). We thus see in him a combination, in an embryonic form, of all the chief traits of the later sociological[2] jurisprudence which I have noted above;—the traits which have been subsequently developed extraordinarily and with great scientific precision in more recent times. But Jhering still stands out as a beacon-light, calling for further progress along the lines of teleology.[1] He raised science towards philosophy and drew philosophy to science and practical life.

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[1] The Historical School reached up to a national theory of Law and did not notice, much less explain, the universal or common facts in the legal phenomena of all societies and nations; the philosophical school aimed at perfect laws and logical deductions therefrom not suited to practical life.

[2] *i.e.*, the psycho-sociological Jurisprudence as opposed to the earlier positivistic theories

Further development of the chief characteristics of modern sociological jurisprudence since Jhering.

(1) The widening of the horizon of scientific investigation was sufficiently clear in Comte himself. Positivism, resting on induction, sought to make it as perfect as possible by enlarging the data upon which the inductions were to rest. It was by this enlarged and developed induction from collective facts of societies that Comte had obtained his fundamental law of social statics, *i.e.*, the law of the organic dependence of the individual on his social environments and his inevitable and necessary position as a member of some social unit like the family or clan. It not only established man's sociological nature from facts collected to prove that man never lived except as a member of a family (the primary social unit), but also the laws of social dynamics, *viz.*, that social institutions and phenomena are produced, established and developed,—are in fact determined—by the direction of the dominant social forces, *i.e.*, the tendencies and desires of the dominant classes in society. The process of comparative study and enlarged induction was extensively carried on in Biology and Zoology by Darwin and

(1) The process of comparative study and enlarged induction.

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[1] *i.e.*, of jurisprudence from a causal science to a teleological science

carried to Sociology and social evolutions by Spencer who collected a large body of anthropological and ethnological materials for the purpose of his social science (sociology) and sociological theories. The object of these efforts was to reach scientific truths, as to the origin, nature and development of human societies and institutions, which would be universally applicable, and not limited to particular societies or nations; *i.e.*, to find out and explain the common features in the legal and social systems and institutions of all mankind. They thus sought to remove what was pointed out by the philosophical schools to be the defect of the old Historical school by scientific extension of the inductive researches and investigations. A host of other enquirers,[1] attracted by the infinite possibilities of such positivistic social science, joined in the enquiry from all parts of the world, and sociological facts were gathered from the observation of the European nations, the Israelites and Phænicians, the Mexicans, etc., and of less civilised races, *e.g.*, the Polynesians, the Africans, and some Asiatic peoples. This procedure of progressive extension has gone on indefinitely. Each new attempt was found insufficient and called for more comprehensive,—wider and deeper,—research. Primitive peoples were not

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[1] Collier, Duncan, Scheppeg, Grosse, Poste, &c.

Description of modern comparative Law or Jural Ethnology.

nature of humanity.[1] Comparative sociology and ethnology (including anthropology) became the goal or scientific idol of the time and the allied science of comparative law (jural ethnology) has thus come, in most recent times, to be regarded as the science "which by a comparative study of the customs and laws of all peoples aims at the discovery of the general process of development of jural ideas and institutions and of the causes which determine them and the principles by which they operate." "It is divided into two parts, 'special' (or analytic) and 'general' (or comparative). The former studies a specific jural system from five points of view; its morphology, stratigraphy, genealogy, psychology, and philosophy; and it therefore has five subdivisions. The latter part (comparative jural ethnology) aims to discuss the general principles and causes of jural evolution by the aid of comparisons of the several systems of Law already analysed by the first branch of the science."[2] This description of the science of jurisprudence given by a master of juristic method of the 20th century will indicate the immense depth as well as the breadth of modern jurisprudence and to what great extent sociological researches have contributed towards its development. The analytic part of the science which represents the depth of the science[1] nowadays aspires, while dealing with the particular jural system of a given society, to (a) the classification of its jural practices and rules under different heads and topics (morphology), (b) the ascertainment of the present type of its social organisation, *e.g.*, feudal, gentilic, &c., and the proportion of their mixture as evidenced by them (stratigraphy), (c) the evolution (both morphologic and stratigraphic) of the system and its stages (genealogy), (d) the relation, compatibility or otherwise, of the ideas and and sentiments of the people, *i.e.*, individuals or the classes, and of the predisposing social, including economic, moral and religious, conditions with the jural system (psychology) and (e) the ultimate causes (philosophy) of the jural phenomena so far as they are ascertained from the antecedent physical, stratigraphic, genealogical and social-psychological conditions traced back to their very beginnings. Sociology and sociological jurisprudence did not of course set out with such an onerous and all comprehensive programme. In fact the earlier sociologists and sociological jurists followed the " method of predetermined limits " and sought to explain Society, Law and Government with reference to some one or a few of its more important determining causal

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[1] See Stemmetz—Classification of social types, Vol. III, Evolution of Law series.

[2] Joseph Mazzarella—Types of Society and Law. (Paris 1908); see Vol. iii, Leg. Evolution series.

The causal character of the science as evolved by the positivistic sociologists and sociological jurists.

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[1] and this repeated with reference to diverse societies supplies the materials for the generalisations of the comparative universal science.

antecedents; but all through its development, this sociological method of investigation of jural phenomena and their evolution, as described above, has taken up throughout the strictly scientific attitude of looking upon jural practices, or the observed courses of permissive conduct in societies, rather than 'legal rules' as the proper and primary subject-matter of the science, and sought for their causal explanation in the antecedent physical, biological and psychological predisposing conditions. In fact, the preponderant tendency of this school has been towards a search for the causal antecedents than for final ends of jural facts and rules which are regarded more as natural results than as voluntary means for preconceived ends [1].

The causal factors of legal development.

The causal foundations and factors which go to form and develop Law have now been broadly classified under different heads:—*e.g.*, A. the Geo-physical; B. the Economic; C. the Biologic; D. the Racial; E. the Religious; F. the Psychologic; G. the Political; H. the Social; and the process of legal evolution has itself been inductively found to follow laws differently enunciated by different sociological jurists [2]. At present I refrain from entering into these in further detail. Some of these will be discussed in more appropriate places [1].

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[1] This refers to sociological jurisprudence proper, *i.e.*, of the positivistic type. Jhering exposed it.

[2] See Vol. III. The Evolution of Law series. The difference arises out of different jurists, laying stress on some one (or more) of these factors (differently selected) as the determining agent of legal evolution.

(2) The doctrine of 'interest', and its paramount influence in social groupings, was discussed with great vigour by sociologists like Mohl (1799—1875), Stein (1815—1890), R. Gneist (1816—1895); and its application for the purposes of the science of Law was a great achievement of Jhering (1818—1892). The technical use of the term 'society', as opposed to the 'state', began with St. Simon, who meant by it an association organised without legal or governmental coercion but by love and fellow-feeling. The Socialists like Marx, Engels, &c., who followed the lead of St. Simon, however, used the term to include organisations exercising coercive power, provided that power was exercised for upholding what they regarded a just economic order. In fact, their so-called ideal 'societies' would be even more interfering with individual liberty, especially economic liberty, than most modern states. Hegel had given a philosophic exposition of civil society as a grouping logically standing between the family and the state,—as an intermediate step in the dialectic development of the family into the State. The primary social unity of the family is dissolved by disruption of the members into the diversity of the civil society by way of

Society as conceived by the Marxian Socialists.

By Hegel

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[1] *e. g.*, where the different subdivisions of the sociological school are discussed, see below.

antithesis, and it is next followed by the higher synthetic organisation of the state in which there is co-ordinated combination alike of the unity of the family and the diversity of the society. This would put Society as included and incorporated within the State. The Sociological school sought to make a scientific study of the various forms of human associations and they arrived at the doctrine of interest; but they did not all agree as to the relationship of society as the total of the several social groups to the state. Mohl regards society as distinctive of those affiliations which are based on community of interest. It includes all involuntary social associations, more or less organised, which severally grew up in a given region each starting with, and developing for, a given set of common interests; and society thus becomes the sum—total of these associations spontaneously growing up as free expressions of these several interests independently of Law, the State and its coercion. The (philosophical) Organic school had conceived of these groupings as organs of the social body as a whole (the state) each serving for some of its needs (Cf. Ahrens); but Mohl's objection to this theory was that many human groupings embrace individuals belonging to different states (Cf. the Church) and serve purposes not regarded as forming part of the purposes of the state. Thus this doctrine of interests, besides setting up the

By the Sociological school.

Mohl.

Society and social groups are permanent involuntary associations held together by community of interests.

society as co-existent with and independent of the state, went somewhat to disprove the biological theory itself of Krause and his followers. Some groups, *e.g.*, family or tribes, are united by community of origin, some by unity of territorial location (cf. commune, or state). These are also involuntary associations but are differentiated from society by their not being based on community of interests. There are, besides, voluntary groups with common interests like partnerships and clubs which arise out of agreement and contract but they are not permanent and can be terminated in the same way.

Stein.

State and society as distinguished by Stein.

Stein was more Hegelian in this respect and described society as the 'life' of the state, *i.e.*, the economic life that pulsates in the community inside the incorporating regulations of the state. He regarded this life of the society as made up of the interaction of the economic interests which stratify the society and constitute and create the variety and antagonism of the various classes as distinguished from the unity of the family. The conflict of these interests of the several classes, notably that of the capatalists and labourers, is prevented from leading to total disruption and sought to be regulated (though in a partisan spirit, wholly in favour of the former) by the State and Law. Stein in fact represented the socialistic view and applied the Hegelian method directed from the point of view of social economics. In noticing, however, that the true interests of the society—the proper and fair distribution of the aids and advantages—is not properly and fairly determined by the Law and the State, as it should be, by the principle aiming at the highest development of the individual, Stein punctuated the antagonism between the Society represented by interests and the State represented by the Law ; and Gneist makes this position clearer still when he points out that Society, *i.e.*, each class representing some interest, in so far as it is checked in its natural progress and efforts in the furtherance of that interest by the legal regulations of the State must be necessarily and permanently opposed to the State. He further emphasises the necessary and inevitable antagonism of capital and labour since "every kind of wealth results in the dependence of those who are without it ; those who have it will do all in their power to establish and continue such dependence, and the dependent will equally endeavour to diminish and, if possible, to do away with such dependence."[1] Society was thus placed in antithesis to the State as associated or organised forms or exponents, respectively, of natural interests, and force or coercion. Gumplowicz also bases the unity of social groups on common interest or interests and regards Society as the

By Gneist

By Gumplowicz

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[1] Berolz-heimer—Legal Philosophies, p. 328.

totality of them all; but he does not place it in opposition to the State as something different from it. It is the State itself looked at from the point of view of the interests of the groups, or of the totality, as they seek their natural development, instead of from the point of view of their forced regulation by Law.

(3) The importance thus attached to the "interests" in Socialistic and Sociological writings and thought soon had its effect, as we shall see hereafter, in revolutionising Jurisprudence. So long as Sociology was handled as a science bent upon finding out the causal forces and their environments or mediums which produce the social products, it was, in spite of Comte's admission that Government (and Law) was not amenable to scientific (positivistic) treatment, assumed that Society, its different institutions and phenomena, were something similar to the mutually corelated parts and movements of the mechanism of the physical universe, and the whole governed by inexorable causal forces; that Law was a department of the social phenomena; and that changes in the other departments of those phenomena inevitably brought about changes in the legal system as well. Sociological jurisprudence, in this early positivistic stage of its development, recognised only the play of natural forces in the formation and development of Law; and all questions of the propriety or otherwise

Revolution in Jurisprudence

Sociological Jurisprudence

Mechanical stage.

the right or justice, of the law came to be discounted as unscientific. Moreover, as I have already told you, according to this view, all law making agencies of the society,—kings, legislators and the judges,—would be mere mouthpieces of the social forces in the framing of the law, and the laws formed by them would be effective as laws only so far as they correctly represented or expressed the resultant or dominant social forces. Any arbitrary law laid down contrary to the current of the predominant social forces would be useless, or, at the utmost, only temporarily effective. This was in accordance with the view of the Historical School and lent to the latter a strictly scientific support which it originally lacked on account of its metaphysical leaning.[1] We may specially mention the names of Spencer and Gumplowicz (1839-1914) as representing this positivistic or mechanical stage of sociological jurisprudence. Spencer, as we have seen, stands unique as combining the doctrine of biological, ethnological and anthropological evolution with that of natural mechanical forces and assimilating social developments to organic growth; so he represents both this mechanical as well as many other forms of the next following biological stage of sociological philosophy. The mechanical stage is marked

Spencer represents a combination of the mechanical and biological stages of sociological Jurisprudence

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[1] See Roscoe Pound. Sociological Jurisprudence, 25 Har. L. Review, p. 492.

by its emphasis of the influence of evironments on social units, and of the social forces and their conflict and struggle,[1] and the resultant influence of such mutually interacting social tendencies expressed through the Law. Spencer is mechanical in so far as he explains social evolution as the product of forces or influences coming both from outside (external environments) as well as originating inside the society from the very nature of the constituent social units. He regards Government and Law as belonging to the group of other social institutions and governed by the same principles—*i.e.*, as natural results of conflicting social forces. The political differentiation of men and women as also of the governing and subject classes, the master and slave, capital and labour, is the outcome of the domestic subordinations (seen in the family circle) evolved, in course of integration of families into bigger and more complicated societies, into subordinations of the political type. Such subordinations and class differentiations are necessary factors of social life—inevitable results of superior forces overcoming the inferior in domestic as well as political (*e.g.*, by war and conquest) and economic struggles. The powerful classes naturally lead the society and guide its movements and the most powerful of them emerges as the ruler; and the feeling of the community *i.e.*, of the dominant classes, is the sole source of political power. Gumplowicz builds his philosophy of legal development on this struggle of forces. Law and statutes express the resultant issues of this struggle, from time to time, in a society of which the units are not individuals or families but groups or races; and the dominant section for time being in the community, representing the dominant forces, lays down the law. He expressly disavows the concern of sociological science with value, right or justice, of laws and institutions, but limits it to this naturalistic position of a mere descriptive science,—descriptive of the social forces, their conflicts and interactions, and of the resultant movements arising therefrom.[1] One current form this theory took, was to compare the social and legal phenomena and the forces behind them with the planetary movements in the solar system under the mechanical forces of gravitation, *i.e.*, the conflict of the centripetal and centrifugal forces of attraction and repulsion.[2]

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[1] *e.g.*, between the rulers and the ruled, masters and slaves, capital and labour.

Social forces which, according to sociological jurisprudence, operate as factors of social and legal evolution, are, as we have seen, of various kinds;—and some one of them is often selected and prominently placed forward as decisive of the evolution. Jhering had indeed drawn attention to this element of conflict and struggle of the various social forces for supremacy, and sought to establish that Law was the compromise by which this conflict is adjusted and equilibrium restored in society. In the latter part of the 19th centnry the geo-physical and economic factors were, each for a time, raised to such prominence. This represents respectively the geo-physical and the economic phases of the positivistic Sociological Jurisprudence in which the whole explanation of all social phenomena is sought to be rested respectively on the geo-physical and the economic forces then predominant in the society and their prevailing tendencies.

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[1] For a more specific and detailed theory as to the mode of origin of states through oonflict of forces representing this stage of Sociological Jurisprudence, see Ratzel's works; also Evolution of Law Series, Vol iii (social factors—conflict in law) and Berolzhemer—Legal Philosophies pp. 357-358.

[2] Seo Prof. Wigmore's article in the Evolution of Law Series, Vol. III.

The geo-physical and economic phases of positivistic or mechanical sociological Jurisprudence

The geo-anthropological theories.

The geo-anthropological theories, by which Buckle (in his History of Civilisation, pub. 1857) and Ratzel (in his History of Mankind, pub. 1896—98) sought, by a more developed sociological method and in a fuller measure, to carry on the investigations and broaden and complete the conclusions of the Historical jurists like Montesquieu and Vico (*viz.*, that social developments including that of Law are brought about by the external causal influence of physical environments like climate, food and soil) may no doubt be placed inside the biological stage (that logically and chronologically seems to have followed the geo-physical or mechanical stage) of Sociological Jurisprudence. But they more appropriately belong to the mechanical stage (or rather to the intermediate stage between the two, *i.e.*, the earliest, *i.e.*, the mechanical, stage of the biological or the latest, *i.e.*, the biological, stage of the mechanical) of Sociological Jurisprudence in as much as, while admitting the biological nature of social growth, they explained it more by the causal forces of the external geo-physical environments than by the character or genius of the races and the influence of race on society upon which the later ethnological sociologists laid so much stress.

Biological (including ethnological and anthropological) phases in sociological Jurisprudence

But biological ideas in sociology led to ethnological and anthoropological investigations. The evolution of the human races and their laws from the earliest primitive stages was sought to be traced by universal legal history for supplying an independent basis for juristic conclusions as to the nature and development of social and legal phenomena. Investigators and jurists like Leist, Post, Meile, &c., belonging to the German Historical School, Ehrentung and others of the Romanist group and even those of the philosophical school like Dahn, Nani and Kohler joined in the movement which gradually grew in strength and proportions; and the science went successively by the name of

Historical Jurisprudence, Aryan urrecht (*i.e.*, of all Aryan peoples), universal legal history, comparative ethnological jurisprudence and sociological jurisprudence (of the ethnological and anthropological type). They may well be regarded as the more matured and advanced forms of the Bio-Sociological Jurisprudence.

I shall now briefly summarise some of the main conclusious of these different types of sociological jurists as regards the various factors of legal evolution. Some idea of the way in which the geo-physical factors work towards the evolution of legal institutions may be gathered from the works of Rendall Semple[1]; and in fact the labours of investigators in this direction have not yet been final. It is clear that we cannot actually distinguish the geo-physical factors from other higher factors, like the racial, linguistic and religious, which are often dependant on the geographical locations of the peoples. We are, for instance, pointed out that the legal systems of the Hindus, the Mahamadans, and of the backward barbarous conquerors of Rome were personal, and the peoples carried their law with them along with their religion or tribe or race; as opposed to the English Common Law and the law of Rome which were territorial, *i.e.*, more amenable to the political interpretation of Law as the product of a particular state. This is an explanation derived from the state of civilisation of the societies concerned.[1] We are also told that geographical divisions explain the wide bifurcation in France of the legal systems (before the great Napoleonic codification) into *Pays de droit Coutumier* and *Pays de droit ecrit*; and at the same time we are told that the same was also accountable in part to the different historical factors, the different military organisations governing the different localities and the different racial elements (Germanic and Roman) prevalent in the respective populations. Countries in isolation are more likely to have pure indigenous systems of law than those in constant contact with other peoples and civilisations than their own. Laws, besides, are often dependent on language; and legal systems of different localities under the same political government vary with the dialect. It is difficult to classify jurists who take care to investigate all such factors to explain differences of legal systems; but they mostly combine the economical, linguistic, racial or ethnological, religious, political and other factors and are more or less comparative in their methods. To group them under different heads according to the prevailing trend of their investigations is all that can be done and such grouping is intended not so much to classify the writers but to classify the methods in the union of which the real merit of Sociological Jurisprudence rests.

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[1] Vide Evolution of Law Series. Vol III

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[1] And not solely from their respective geo-physical environments, but the two may have some connection with each other.

Geo-physical environments : how they affect Law.

The geographical environments affect human laws by affecting the physiological and psychical nature of the man and of the society. The exigencies of life, different in different places, prepare some nations for agriculture, others for navigation and trade, others for pastoral or nomadic life. Climate affects their temperament and habits of life and is reflected in their religion and literature, thought and speech. The connection of the society with its habitat marks the stage of civilisation, and a comparison of the different societies at different stages of civilisation, *e.g.*, the Norman hunter tribes, fisher tribes, pastoral societies and agricultural societies, leads to the conclusion that, in less civilised races, the connection between the society and its land is loose, and it becomes more intimate as the society evolves and is more and more capable of utilising for its maintenance the natural resources of the soil for a plentiful and regular supply of its needs ; and further, " every advance to a higher state of civilisation has meant a progressive decrease in the amount of land necessary for the support of the individual and a progressive increase in social organisation as also in the relations between man and his habitat. The stage of development remaining the same the *per capita* amount of land decreases also from poorer to better endowed geographical districts and with every invention which brings into use some natural resource."[1] The increase of density of population, increasing with the intimacy between society and the land, necessitates and brings about a more highly organised government for securing against internal friction as well as external attack. The State's sphere of duty is still more increased as, with growth of industry and commerce and wealth, the foundation is laid for still more increased population and still more complex relations between Law and the people. It has to undertake, or assist in, the construction of improved facilities of communication, high ways, canals, railroads, steamshiplines and to make stronger arrangements for attack and defence and a more organised and developed jurisprudence. The geophysical relation of supply and demand also accounts for many of the social customs. Where production is in excess of population, customs favour prolific generation ; but where it is the reverse, *e.g.*, in unproductive high lands, or where women are scarce, customs restrict marriage, and favour polyandry and other positive checks to population, such as, infanticide and abortion. The more enterprising and civilised societies, of course, seek to cope with the natural difficulty by the higher and nobler means of industry and international trade, protected by a strong navy, and also by emigration and colonisation; and the feeble society retrogrades (and often succumbs to a stronger invader) when it fails to struggle against the difficulties of its habitat. The strong society progresses by overcoming them by the extension of its field of activity and expansion of its world relations beyond its territory. The history of world's progress has thus been strongly influenced by this relation of the people to its geo-physical environments.

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[1] Semple—Influences of geographical environment: quoted in Vol. III Evolution of Law Series, p. 227.

The Economic phase of Sociological Jurisprudence.

The doctrine of 'interests,' *i.e.*, the economic interests, as the central basis of social integration as well as differentiation, and as the mainspring of the social forces (*e.g.*, conflict and struggle) behind all social evolution may well be remembered in connection with this phase of sociological jurisprudence. The positivistic idea and theory of social forces, their conflict and struggle, is here more or less confined and limited to economic forces or conflicts and the economic interests giving rising to them. In Gunplowicz we find this tendency towards emphasising the economic interests and forces in his sociology and sociological jurisprudence. The same attitude is noticed in the recent American jurist Brooks Adams. The positivist explanation of social phenomena, as resultants of struggle or conflict of social forces, is here combined with the view that economic forces are the most prominent of them all. Here also we find the same fatalistic theory of Law, of the positivist mechanical stage, the same idea, that the sovereign is a mere mouthpiece for the expression of the resultant of the conflicting social (here economic) forces, that Law is the necessary expression of the wishes of the most powerful (economic) class whether it be priests, or usurers, or soldiers, or bankers, that 'Right and Justice' are not relevant in jurisprudence for it represents at every epoch only what is consistent with the interests of the dominant class backed by its dominant forces,' and that the sovereign in 'willing' the Law has no more independence than the earth in describing its orbit, for he must act according to the definite wishes of the dominant forces of the community.

How it partakes of the mechanical or positivist stage.

The exponents of the economic theory,[1] however, generally accept the Marxian theory, and deny that national conscience or spirit or geo-physical environments affect the legal systems of societies as much as the economical conditions. You must have noticed that much of what the geo-physical jurists would regard as external local influences, *e.g.*, the productivity of the soil and the character of the natural facilities for earning a livelihood, may well be taken, by the economists, as economical

The Economic factors

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[1] *e.g.*, Brooks Adams, Croce, Loria, &c.

factors; and there is therefore not much debatable ground between the two sections of sociologists except perhaps one of nomenclature. The economic jurists would point out [1] that, in spite of local and racial differences, the legal systems of primitive societies at different parts of the world, *e.g.*, in Asia, Greece, and Africa, show marked essential similarities so long as they were worked out on a family instead of upon a property basis. We have, for instance, in all, a matriarchal family and its peculiar relationships recognised by Law, which cannot be explained otherwise than by reference to the common economic system of the countries. The family community and the holding of property by the group, as the social unit, was the common ground from which the Romans in their primitive stages, the Irish, the Gauls and the Germans had derived their earliest social economy; and this is how, inspite of their immense divergence in other matters, their ancient laws were so peculiarly similar regarding such important particulars as the classification of persons, *patria protestas*, marital rights, agnatic family constitution, inviolability and and inalienability of private property, stringent law of debt and personal obligations, and an elaborate system of oaths and judical warranties. The Romans as well as the old German

Law as affected by economic conditions.

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[1] Loria-Economic foundations of law.—Quoted in Vol. iii. Evolution of Law Series pp. 234 *et seq.*

stock had nothing in common between them except identical territorial conditions giving rise to an identical economic constitution. The land was free, *i.e.*, belonging to the group, and accessible to all alike, and the economy was not individual, or capitalistic, but collective. With the disruption of communal landholding, and the introduction of capitalism and individualism in economics, profound changes were introduced in the legal systems and they assumed different shapes in the Germanic and Roman worlds, tending, in the comparatively barren and unproductive and hence less valuable soil of North Europe, to serfdom and feudalism ; and, in the oppositely conditioned soil of the southern Roman Empire, to slavery and dominion. The labouring freeholder was easily contented with his serfdom in the north ; and the rich noble was satisfied with his paramount overlordship, without grudging to allow the weaker party to have some interest in the land. The Roman proprietors in the south, through deadly strife, succeeded in expropriating the cultivator, who, after severe struggle, had to sink into slavery. The respective legal systems of land tenure accordingly came to differ ; and the difference rested on the difference in the economic condition of the soils and of the consequent economic interests. The maturer Roman Law was essentially a system adjusting economic relations subsisting between the several landed proprietors, each regarded as an absolute owner directly connected with the soil; whereas the Germanic Law was most intimately connected with the more elaborate land tenures and the regulation of the various forms of (patriarchal and domestic) duties and sentiments[1] subsisting, through economical exigences, between the different social strata of which the holders of the landed area were composed, *i.e.*, the multifarious forms of economic relations between property and labour, which were not so much in evidence in the Roman system. Loria takes pains to point out that the gradual substitution of the northern feudal and customary legal system of the Lombards, for the indigenous Roman Law, in Italy, which was fairly completed by the 12th century, was the result of the introduction into medieval Italy of the economic conditions of the serf-system of the north; and that the opposite phenomena of the Romanisation of Germanic laws, noticeable in the 15th century, is explained in an analogous way, *viz.*, the conversion, by the introduction of crafts, industries and guilds, and hence, of wage economy and labour contracts, of the older feudal conditions. The mature Roman Law, which was thoroughly individualised, with its elaborate law of contracts, was more suited for these new economic conditions which could no longer be satisfactorily adjusted by the old feudal customs. He also explains, by his economic theory of Law, the subsequent renaissance of the Roman Law in Italy when this wage economy entered its threshhold after the expropriation of the cultivators. He thus establishes, by legal history, that Law is not the product of abstract reason, nor of national consciousness; nor is it a racial characteristic, but it is the necessary outcome of economic conditions, and changes along with economic changes.

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[1] See Maine's Ancient Law regarding the character of these duties and sentiments between the Lord and his vassals under the Feudal System of Northern Europe.

The departments of Law: how affected by economic conditions.

Family Law.

Loria examines the various branches of legal systems to make out that each of them is a necessary product of particular economic conditions. The family law begins as soon as the tribal promiscuity is converted into the matriarchal family system through the economic necessity, of co-operative labour for means of substance, arising out of increase of population. Working hands are now recruited, by marriage, from foreign groups by the women round whom, as maternal heads, these matriarchal societies collected; and Law helped this by forbidding intermarriage among members of the same group. As however population, and along with it, demand for further productive force went on increasing, the economic arrangement on matriarchal basis was found defective for the purposes of coherence and organisation of the masculine elements of the clan. The superior strength and working capacity of the adult males soon secured for them economic ascendancy over the females and the children; and the legal ascendancy of the former, by the substitution of the patriarchal system in the place of the older system, was a necessary concomitant result. The Law of persons, including *patria potestas*, shaped itself naturally to suit the economic necessities. The wives and children were reduced by Law to the position of slaves. The Law of property shaped itself to suit the wishes of the acquirer, as he come to be more and more respected for his increased economic worth, and became individualistic; and succession became agnatic.

Law of Persons.

Law of Property.

Evolution of property.

The dependence of the evolution of property law on economic conditions is so clear that only a passing reference to some of its leading phases will be all that is necessary. When there is an unlimited supply of free land for user, no distinction between land and moveables is thought necessary to be recognised in Law; but, with the increase of population and of the needs of life, land value is increased, and private property in land is instituted, for the encouragement of individual enterprise, together with the distinction between land and moveables and between communal (*ager publicus*) and individual ownership of land. For the same reason, limitations of the legal right of ownership are gradually removed except those which, like servitudes (especially the rural ones), *usucapio*, *habitatio*, *fructum usus*, *specificatio*, etc., are allowed to remain, or are newly introduced, to reward and encourage cultivation, labour and production, and penalise neglect or absenteeism. Contracts and alienations were, for the same reason, freed from the obstacles of form and enforced, for the purpose of exacting good faith in mutual dealings, inspite of technical or formal defects. The economic reason was undoubtedly the encouragement of free circulation of property, industries and commerce. The Jus Gentium or Jus Naturale was mostly, if not wholly, the product of the development of the intensive economy of the Romans; and the later legal liens placed upon property in favour of labour, in the shape of servitudes, quit rents, pasturage rights, banalities, rights of chase etc., in the medieval feudal days were introduced and encouraged by Law so long as they were regarded as helpful in social economy.

Condominium and individual property.

Condominium, of ancient communal economy, gave way to private property as the latter was more conducive to intensive labour and production required by the increasing density of population. Private ownership led to slave economy as the owner of land was unable to cultivate his large tracts himself or by his children and other family members. Slave economy was, however, found unsuitable for effective production, for the slaves, with no interest in the produce, would not put forth their best efforts. This economic necessity led to serf economy; and then again, the rise of capitalistic industries and commerce and the increased wealth and power of the capitalistic land-owner, moved by conscious self interest and attracted by the increased value of land and its products, led to the expropriation of the serfs and their reduction to the status of employees, on wages but with no interest in the land or the business. This stress of economic conditions brought about an oscillation of legal property first from condominium to private ownership; next, back from absolute ownership and slave economy to feudal ownership and serfdom; and, lastly, a forward movement again to individual capitalistic ownership and the wage system. It will not be inappropriate here to mention that the next backward movement is already visible, towards a system when wage earners would again rise to the level of sharers in the profits of land and business; for the growing economic demand for intensive labour is now indicating that the fixed wages should be changed for some arrangement by which the labourer will profit in proportion to the value of his production.

Law of inheritance

The law of inheritance also, like the law of property, evolved on economic basis. In periods when the principle of condominium prevailed in some form or other, as in primitive Rome (and, we may add, in the orthodox Eastern communities) or in the medieval feudal ages of serfdom, succession *ab intestato* was the legal order. Testamentary succession came to be encouraged by Law when the individualistic or capitalistic property system came to be the economic order, as in the days of slave economy in Rome (cf. The Twelve Tables), and in the more modern days of wage economy since the latter part of the middle ages; and, curiously enough, as the society enters into an opposite period of transition, *e.g.*, from the individualistic slave economy to the multiple feudal ownership of the lords, vassals and serfs, the Law's trend to discourage arbitrary and wholesale testation by imposing multiple restrictions becomes clearly visible. In Rome itself, slave economy gradually gave way, and, with it, the absolute authority and ownership of the *pater familias* over the children and slaves was curtailed by Law. The interest and ownership of sons, and even of slaves, in certain contingencies, in the produce of labour came to be recognised; slaves were in many cases raised to the position of holders of interest in land as tenants;[1] and the right of free testation, against the interests of the family members, was curtailed by equity and legislation. Later still, when slavery was succeeded by serfdom, some of the conditions of the primitive economy were reproduced. Holdings of serf lands were not granted to the individual, but to the family to be handed down undivided to successive generations for continuous and careful cultivation; and these peasant holdings would follow the rule of intestate succession. It was only the peculiar semi-political nature of feudal property that necessitated the introduction of the rule of primogeniture; but even here the eldest son at first held only a representative character on behalf of the whole family for purposes of administration and jurisdiction.[1]

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[1] See Sir Henry Maine's account of the origin of R. Emphyteusis.

Law of Contract

The law of contract also similarly underwent changes under the stress of economic necessities. When land was free and every one would easily get lands which he could cultivate, the only means available to one who would have more lands than he could himself manage with his family members would be by procuring slaves. Law helped and favoured this recruitment of slaves by laying down the personal basis of obligations and debts and permitting the creditor capitalist to hold his insolvent debtors as slaves. Tenants in ancient Roman Law had only a right *ad rem* and no real right; but this precarious status was unfavourable, as economic intensity increased, to strenuous productive effort; and modern law has, accordingly, gradually conferred on the tenant a right *in rem* and has afforded him greater privileges and facilities, *e.g.*, in the shape of a right to redeeming his rent charge and becoming the proprietor (cf. in Ireland), or to compensation for improvements (in England).[1] Freer circulation of capital, demanded in the days of economic and commercial progress, has led to the abolition of the 'legal rate' of interest and imprisonment for debt, and to provisions for publicity (by registration) of the mortgage, and free alienation of land (*e.g.* by the abolition of the Statutes of Mortmain). The modern laws of negotiable instruments, bills of exchange, laws regarding transfers on bills of lading and like documents, laws of banking, corporations etc, have all been brought about by the economic necessities of modern days.

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[1] Mame's Ancient Law, Ch vii. Adam Smith—Wealth of Nations, p. 305.

Law of crimes and punishment.

Economic conditions have called for heavy punishments, and a rigorous law of crimes, as against offences against property. Crimes themselves are mostly the results of economic causes, such as excessive want or excessive wealth, both of which have a corrupting influence on morals. The betterment of economic conditions would strengthen the capacity of the individuals, to resist deleterious appetites, and minimise crimes in a society. Even the cases of born criminals, whose criminality is ascribed by anthropologists, like Lombroso and his followers, to physiological constitutions born of heredity, may be explained by tracing their history through generations of untoward economic environments. The economic sociologists would therefore recommend the proper adjustment and improvement, by Law, of these economic conditions, and a more equitable apportionment of punishment to the crimes, judged by their economic effects on society, with due consideration for the economic influences that prompted them.

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[1] Cf: also similar right conferred by the Bengal Tenancy Act.

Contributions of Sociological jurisprudence in its mechanical stage to the science of Law.

The mechanical (including the geo-physical and the economical) positivistic stage of Sociology has, as we shall see hereafter, been thoroughly outgrown; and it is now credited with having contributed to the Science of Jurisprudence nothing of value except its refutation of the individualistic or contractual view of society or state and its origin (which was already accomplished by the Historical school), and its theory, of the individual as himself a social product, and of Law as a closely correlated branch of the social sciences. The mechanical sociological theories were soon mixed up with, and supported by, the biological or organic theory of natural selection. Conclusions like those mentioned in the last paragraph were sought to be supported, in the last third of the 19th century, by the analogy of the

Biological theories.

Darwinian laws of biological growth, based upon struggle for existence and natural selection, found to subsist in human societies as well as in the lower organic (vegetable and animal) kingdoms. So long as it held fast to this biological conception of Society and Law,—to the natural process of evolution by the cruel and inexorable elimination of the unfit in course of the struggle for existence,—and cherished the idea that the function and object of Law was simply to give free play, in an orderly and regulated manner, to this natural struggle and elimination (which was supposed to be calculated by nature as best suited for the benefit of the race), Sociological jurisprudence encouraged, as before, the Laissez Faire policy in legislation and was as fatalistic and unfruitful as in its earliest stage ; and both were equally shocking to the new rising social conscience in the awakening of which Jhering took such a leading part.

Biological explanation of society.

The biological explanation of society is based on the principle of vitality and its necessity of expansion.[1] The needs of individuals, arising out of their vital principle, lead them to expand their vital forces and compel external nature to yield their satisfaction ; and association of several individuals is one of the forms of this expansion by which a more adequate satisfaction of the life's essential necessities is attained than is possible by individual effort. The characteristic feature of a properly formed society would accordingly be a permanent association of individual efforts leading to the realisation of a common purpose; and its organic perfection is approached as the individuals contribute to the common life and purpose of the whole body and render reciprocal services by which alone complete satisfaction of the needs of life of each can be attained. The primary necessities of life, determining the existence of society, in order of their essentiality and importance, are nuitrition, reproduction and a life of relation. We find societies formed under the stress of these necessities in lower animals as well as in men. The primary need of reproduction gives rise, in advancing stages, to (promiscous) conjugal societies, maternal domestic societies, and paternal domestic societies, in which the permanent bonds of union are, in order, mere sexual attraction, (the mother's) love of offspring, and sympathy and affection which attracts the male parent to take charge of the collective family life. Opinions of biological investigators seem to be divided on the point whether the family instinct, which inclines men and animals to form conjugal and family groups consisting of monogamous mates and progeny, is conducive to the formation of larger social organisations,

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[1] See Espinas—Des Societes Animales.

Common to man and lower animals

Family and social instincts.

Letourneau[1] Zanetti, Giraud Teulon[2] and others regard family and society as mutually antagonistic, for the family instinct is essentially jealous, and disfavours larger associations in which the exclusive privileges of the males would be endangered. It is supposed that the polygamous type of family is necessary for the formation of the larger and more complex social organisations ; and that the necessities leading to family life, and to society, are independent and distinct. They are, respectively, the necessity of reproduction including the closely following affection for progeny (for the former), and that of co-operation for purposes of defence (for the latter). Others, like Posada[3] and Petrucci,[4] while admitting a natural exclusiveness of the two instincts, hold that the two instincts may synthetise and societies may be found to be formed by integration of family groups.

Biological explanation of matriarchal and patriarchal family systems

This question of antagonism of the family and social instincts is closely connected with the other debated question whether the male or the female is the basis of the family life, and whether the matriarchal or the patriarchal family is the creator of social life in the horde or the tribe. The biological sociologists, however, have not come to a definite unanimous conclusion on the point beyond that the predominance of the male factor in family groups gives then a more distinctive character, and greater and higher coherence and organisation; but it cannot be established as biological truths that monogamous and polygamous, or matriarchal and patriarchal, families follow a regular sequence,[1] or that they necessarily indicate any definite stage or grade of intelligence or biological evolution of the animals or individuals composing them; or even that the female's love of progeny leads to the family or domestic life[2] and the male's more developed aptitude for attack and defence and co-operation makes him the direct producer of social life.[3] The social life of relation and organisation depends largely on external conditions, on greater number of needs and lines of social activity for their satisfaction; different family types may, under stress of external circumstances, equally produce it. Posada concludes from a study of the superior vertebrates like the anthropoid apes :—(1) monogamy and poligamy may be found in the same species; (2) absolute superiority cannot be claimed for either of these two types of family among animals; and (3) extended forms of society do not necessarily depend on the form of domestic life of the constituent members.[3] Biological studies of the animal societies for tracing the history of human societies indicate that isolated existence, family life (maternal and paternal), and social life were most probably formed in succession by way of progressive social synthesis in obedience to natural wants; but that this order of succession was not universal, and was modified by the external circumstances determining the form of organisation best suited for the time for the satisfaction of their necessities amidst the particular environments. There was, however, a concurrence of different social forms among primitive men and the tendency was towards the increasing predominance of the male as the leader.

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[1] L'Evolution politique, p. 22.

[2] Origines der marriage et de la famillee.

[3] Annales de l'Institut, &c. Vol. III, pp. 271—318—translated in vol. iii. Evolution of Law Series, p. 205.

[4] See vol. iii, Ev. of Law Series p. 313.

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[1] Adolfo Posada "Annales," translated in vol. iii, Ev. of Law Series, p. 276.

[2] Posada controverts Zanette's view that the male is opposed to the creation of the family and sides with Sir H. S. Maine who seeks the support of zoological sociology for his patriarchal theory of society, see p. 283, vol. iii. Evolution of Law Series.

[3] *Ibid* p 281

The Biological theory of property.

The Biological theory of property,[1] like that of society itself, rests on observation of the vegetable and animal worlds as well as of primitive and infant societies. Latest biological researches go to show that property is a natural fact antecedent to all legal organisations; and this falsifies the theories of political economy which ascribe its creation to the Law. In its two types of individual and collective property it is found to be an instinctive fact common to all mankind and the result of the physical and mental structure of man. The earliest or embryonic form of private or individualistic property is found when man, by his activity and art, extends his muscular control over external nature by the invention of implements and arms for attack or defence, or the other useful purposes of hunting or fishing, or for the more advanced necessities of pastoral or agricultural life. They are as it were extensions of his limbs, closely connected with his person and physical nature. The social nature of man is simultaneously reflected as well in the *life* of family and social groups to which he is instinctively driven, and the social duties of defence of the group against outside attack and ministering to its wants, as also in the collective tribal *possession and ownership* of land for the common habitation or chase. Property is thus an outcome of the inherent physical and moral (social) necessities embedded in the nature of man which compel him to adapt himself to his surrounding conditions and to make them subservient to the satisfaction of his needs.

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[1] *Vide* R. Petrucci's "Les origines naturelles de la Propriete" Bruesels 1905, translated by Albert Kocourek, Evolution of Law series, Vol.iii, Ch. x.

Property in animal and vegetable kingdoms.

That property is the result of natural biological necessity is established by the evidence of its existence even in the vegetable and animal kingdoms. It is marked amongst them, as among men, by the exclusive control over it by the individual or the group, its exclusive exploitation for the benefit of the possessor, and the application of force for maintaining and protecting that control and exploitation from outside attack. In its earliest forms, property arises out of the need of nutrition, as in the prey of animals; and, next, out of the need of shelter, as in the temporary or permanent sheath, refuge or nest made by the animal or bird for its rest or protection. Both in plants and in animals we come across the individual as well as the collective types of property in food—stores as well as abode.

Internal and external property

The first property of the organism is its own body. It affords a shelter and contains a reserve of nutrition which stands in good stead when the want is in excess of the regular supply. There is often a particular external organisation in the vegetable or animal body whereby, as in the hump of the camel or in the fatty tissue of the seal, an excess of aliment is stored up and afterwards utilised during the phases of denutrition. Property external to the body may thus be properly regarded as a sort of reflection in the external world of this internal organisation—a projection, as it were, of the inner economy of the organism to meet its natural necessities. Social storehouses of property are also found inside the individual organisms, *e.g.*, of honey, for collective use, in the stomach of the ant, or of organic wax in the glands of the bees for the making of the common hive. In this last instance, we see the individual organism itself preparing and secreting a product for creating a collective property external to the individual.

Where the organism of the body does not automatically itself gather, as above illustrated, from the external nature and supply the materials of external property, the animal or bird, by its industry, exploits its environments and makes up and realises individual or collective external property, in food stores or shelters, or both. Thus the inner organisation of the animal, its structure and nature, is reflected and prolonged outside, in its industry, and is realised in external property. The same phenomena are observed in the vegetable kingdom as well.

Struggle for the defence and maintenance of property is also a biological phenomenon. In animals, as in plants, the young ones are separated and placed outside the parents' storehouse of nutrition and shelter as soon as they are capable of maintaining themselves. Outsiders encroaching within these limits are fought out and resisted. Some plants project their seeds outside the region on which they depend for their own subsistence and smother outsiders seeking nourishment within the ambit. Plants, like animals, are, some of them, individualistic, and some, social. The latter live in groups over an extensive area which serves them all as the common storehouse and residence.

Property among fishes.

Forms of property are seen among fish in the shape of holes excavated by them in the sand or mud in ponds, or along river-banks, for individual abode and shelter. The social stage is reached when nests are built, in the spawning season, where the eggs are deposited, and the male watches over the nest and defends it against danger; all the elements of social property—*e.g.*, industry, employment of materials gathered form the external world, and defence of what is created,—and the social instinct of service for the perpetuation and protection of the species are here present. But this social form is reached through several stages; in some cases, only a hole is burrowed and the eggs are left unprotected (*cf.* trouts); in some, considerable industry with selection of materials is developed in making nests, *e.g.*, of weeds, for a permanent habitation of the eggs and young ones (*c.f.* antennarinae); a higher level is reached when the male remains and watches over the eggs (*c.f.* the bull heads; the variegated labrus). Sometimes the still higher stage is noticed when the male and female coöperate and jointly defend the nests till the eggs are hatched (*c.f.* the callichthyidae and the doradinae). A still higher social instinct, not limited to the family and progeny, is seen in the stickleback which live in troops. They have their individual holes and nests as private property and defend them with great vigour against the other members; but, in the presence of the common enemy, they would combine and jointly defend themselves, and their own against him. The male only constructs the nest and defends it.

Property among animals.

In lower animals, weapons and tools, in most cases, take the form of organic adaptations of the bodies to external environments and necessities. Like hanging cheeks, distended mouths (of certain rodents), humps (of camels), pouches (of pelicans), and stomachs (of ruminants), meant as storehouses for food, they have their pincers, scissors and tongs (as in the case of insects), horns, teeth and claws as tools and weapons formed in the body itself. The trunk of the elephant or the hand of the ape is also such tool or weapon of a more advanced type; and, in man, the hand itself is the means (for prolongation of his activity and control over the external world) in the creation of weapons and tools. These tools and weapons of the primitive man are, as said before, his individual properties. They are prolongations of the individual himself, created by his

Property among men individual and collective

powers and perceptions out of external materials, as a kind of added force to his personality. Thus among men, as in animals, individual ownership does not appear to have a social origin; and property becomes progressively socialised or collective along with the socialisation of the animal. In the matter of clothing as property the same truth that it is prolongation of the personality of the animals is traceable to the fact that in many lower animals *e.g.*, among mollusks, crustaceans, a large number of worms which excrete a substance which envelopes the body, and larvae which spin a cocoon, the clothing is in the body itself or a product of the body; and the temporary or permanent clothings of the primitive man for organic protection are, like his tools and weapons, attached to his personality as its projection or prolongation in external nature—adaptations of the materials of the external world, for individual purposes. The food reserves of the primitive man appear after the fixed abode; and, in this matter, man appears to be inferior to some animals who have food reserves even before socialisation, *e.g.*, in the body itself. Preserved fish of the Eskimos, granaries of the Yosemite Indians &c. are generally socialised property attached to socialised abodes both coming under the head either of family or of collective property arising out of coordinated efforts to a common end. So far as the appearance of collective property in the shape of food reserve is noticed to depend upon collective abode and to follow after it, man and the lower animals exhibit the same line of progressive evolution. The common hunting land of the group is also collective property alike in lower animals and the primitive man.

Parallelism between lower animals and the primitive man

Petrucci thus summarises the parallelism between lower animals and the primitive man (before the appearance of the art of agriculture) regarding the rise and integration of property :- "In groupings of uncivilised peoples there are discovered the three forms of property which undergo a process of integration and superaddition as in the animal world. Individual ownership is shown in weapons, tools and clothing, which is as much an expansion of the individual himself as the direct result of his presence within the social group. Next, family ownership is manifested generally in the shelter and sometimes in hunting land whose limits are more or less clearly defined. Lastly, collective ownership is shown in a common territory within the limits of which individual and family groups have their play. It is well to note that as in the case of animals, the group among primitive men is sometimes limited by the family."[1] The forms of property alike in man and in lower animals are determined by the predominating external conditions and their adaptations of life to these conditions. The ungulate (solid-hoofed) animals of the steppes in Asia and Africa rove about in bands over a wide-extended terrain for pasturage as do the fjeld Lapps and Bushmen (hunters) follow about the animal herds, *e. g.*, of reindeer and other animals on which they depend for their sustenance. Men and animal groups alike become more identified with a definite territory when it renders a constant supply. In regions, *e.g.*, in the extreme north, where the differences between winter and summer are very much pronounced, primitive man constructs different habitations in the two seasons except where he can take positive measures, *e.g.*, changes of dress sufficient to combat these climatic variations. The lower animals unable to take such measures, often migrate or have a hibernating period. Men, like animals, evolve out of their wandering individual and family lives, first, by temporary tribal rendezvous or meeting places, for fetes, dances, and settlements of differences, as periodic expressions of collective personality; and, next, by more permanent encampments or huts for individual or family abode with a common space reserved for common use, *i.e.*, by organisation of a village. This ancient prehistoric evolution is noticed also in lower animals. I have here noted a few out of numerous comparisons by which Petrucci establishes that the primitive customs of man represent an inheritance of animal habits and exhibit a similar evolution of the social type; and the conclusions reached by him by biological research as to the phenomena of property are:—

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[1] Evolution of Law Series vol. iii, p. 308.

Petrucci's conclusions.

(1) Property is a phenomenon connected with the earliest manifestation of life. (2) In the beginning it is the expression of physiological structure and of adaptation. (3) It takes individual form when so required by biological necessity for the protection of the individual. (4) It takes family form when so required for the protection of the species based on the instinct of sex. (5) It takes collective form when that form is necessary for the protection of the species based on phenomena of association considered as a generalisation and abstraction of the family grouping; and (6) the individual, family and collective forms of property are specifically distinct from each other limited and characterised respectively by (a) the special structure, necessities and activities of the isolated individual, (b) the limited associative tendency connected with sex instinct and parentage and (c) the higher associative tendency to realise a common life and collective personality through reciprocal and cooperative work. The family instinct in both animals and man is at first antagonistic to the social instinct. At the time of sex attraction the

band or colony of animals would often disintegrate into several isolated family groups. When the young of the families grow adult, the society again forms but without the family; but, sometimes, when the family and social tendencies cooperate, we find families integrated into the larger groups; and from this we may conclude that, among men also, the family form of life constitutes a type of its own. It may often predominate over and prevent, or become destructive of, the larger associations; but when under stress of a series of influences the two types and instincts are made to converge and cooperate for common purposes of life, the small group will integrate within the larger and family property will have its proper place alongside the communal. The family is thus not a social unit and is not essential to the organisation of the society, nor is the genesis of the society necessarily traced to the family. Then again, there is no direct connection between social and mental phenomena. Animals with lower intelligence, like the beaver, the marmot or the penguin, exhibit much more complex social organisations than other neighbouring species which live in isolation. The bee is more social than the wasp. Hunting and fishing hordes with many superior traits of intelligence and combination may, through their harder conditions of life and struggles with enemy tribes, be held back to a less

Family and social instinct

evolved social organisation than more backward peoples with lesser mental capacity whose natural advantages of life had helped them to attain the higher organisations and more fixed abodes and other forms of property ; and these biological facts indicate the danger and mistake of a sociology based exclusively on psychology at least before the appearance of agriculture (a).

(a) Another offshoot of the biological (embryological) or rather bio-sociological enquiry has been the study of the juvenile life and society The young of each species, from birth to the attainment of maturity, are supposed to pass though all the stages of growth through which the species itself had passed since its prehistoric beginnings ;—or, even more than that, they rapidly reproduce and go through the whole course of evolution by which the species itself had been slowly evolved out of all lower forms of life, beginning from the lowest So that in the children and child-societies the careful investigator is likely to have a very fruitful field for sociological and socio-juristic research in which first hand information may be had regarding prehistoric stages of human societies which would be unrivalled in point of accuracy and reliability. The students are recommended to read an interesting study of such a juvenile society contributed in 1884 by Mr. John Hemsley Johnson to the "Johns Hopkins University Studies" (Vol. II no XI) and reprinted therefrom in vol. iii Evolution of Law Series pp. 316 *et. seq.* I quote here from Prof. Wigmore's editorial note on Mr. Johnson's paper the following pregnant remarks :—

"The editor begs leave to call attaintion to the sociological and institutional significance of this monograph. Upon an old Maryland plantation, itself connected historically with that system of manorial land tenure which supplanted primitive democracy and ancient land community, a plantation once the home of slaves and tenants who did the bidding of their lord and master and who now lie buried in the lord's waste land, a fresh and Juvenile Society has now sprung into being. Although still under the authority of a master,—the principal of the McDonogh School—the boys have reverted to a primitive democracy, and are passing through much the same cycle of agrarian history as that through which branches of the great Aryan race have passed again and again. First came a system of land community among those fifty boys

Ethnological Sociology and jurisprudence.

Some biological sociologists are very much attracted in their general sociological and juristic theories and conclusions by what they regard as the ethnological and racial factors of social evolution. Post (d. 1895) in his "Ethnologische Jurisprudenze" insists upon the investigation of the ethnic causes of the social and legal manifestations as supplementary to, and corrective of, the other lines of research. Like the mechanical and the biological and the economic and other kinds and departments of sociological investigators, this school, led by Poste [1], also follow strictly positivistic or scientific lines; but we shall find

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inhabiting the eight hundred acres, remnant of that old plantation of three thousand acres, a part of which was purchased for the Institute of John McDonogh who is now worshipped as the eponymous hero of the McDonogh clan of small boys. He is the tutelary founder of that school boy micropolis. While the principle of patriarchal sovereignty endures in the headship of the school, the boys still represent in many respects the survival of primitive democracy. And yet chiefs or elders arose from time to time among the McDonogh boys and arrogated to themselves, by reason of their superior strength, age or ability, the control of the public land, for hunting and fishing, for rabibit trapping and bird nesting. Primitive democracy is now in danger of that subversion which has been the unhappy lot of the small farmers in England. But now comes a socialistic party once more demanding, so to speak, the *communisation* of land. The land holding aristocracy yield very slowly and urge the commoners to accept certain distant, as it were colonial, tracts of land for squirrel hunting and rabbit trapping. Here in miniature is the agrarian history of the English race of hunters, trappers and enterprising colonists, nay it is the agrarian history of our Aryan race. Mr. Johnson in his picture of McDonogh institute, has shown us a microcosm, not only of the agrarian but of the political and economic history of society."

[1] also by Leist.

later that the Philosophical or the metaphysical jurists in this period had also their biological and ethnological investigations and theories[1] in which,—although *a priori* assumptions as to the legal spirit or genius of each race, like those of the early Historical jurists, are deductively made to support and interpret the ethnological jural facts and phenomena collected by comparative inductions, the paramount importance of comparative and anthropological investigation is freely admitted. The contributions of this school to Sociological jurisprudence, however, are apt to be overrated, and for sometime too much was made of them by their authors. A wave of reaction has now set in and the more recent estimates do not allow them a larger share of credit than that of broadening the materials of historical and philosophical jurisprudence. Sociologists and jurists like Small,[2] Durkheim[3] and others have pointed out that the early race characteristics of a people do not furnish the only clues to human nature; and the Law, especially of the mixed races, emanating as it does from the whole group, is more or less freed from physiological influences diversely affecting the different individuals and races composing

The services of the Ethnological school

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[1] *e.g.*, Carle—La Vita del diritto—Book IV Voigt—Romische Rechtsgeschiste I § 2 (1892), *cf.*, also Dahn, Nani, etc.

[2] General Sociology, p. 100.

[3] Quoted by Tourtonlon in "Phylosophy of history of Law"—p. 85.

the group. The Ethnological school are apt to overrate the relativity of Law, to particular peoples and races, like the Historical school, and underrate the universal and fundamental forces and forms of social and ethical life of man from which Law springs. Like the Historical school, it fails to explain the universal characteristics of Law and its evolution and to take account of the common human basis which gives rise to them.[1]

Influence of the racial factor.

That the racial factor has a very potent influence in characterising the Law cannot however be questioned. Its exponents point out that it is more powerful in shaping the law and civilisation of a people than the geographical factors, over-emphasised by Montesquieu and Buckle; as we see countries (like Asia Minor and Greece) with similar climatic and geographical conditions have had entirely different civilisations due to the racial differences of their inhabitants.[2] They further declare that the evolutionists, who, like Bachofen, Spencer, Starke and Maine, stand for a theory of uniform development along fixed lines for all peoples and societies, are wrong[3]; and their comparative historical jurisprudence is superficial, which ought to be supplemented and corrected by the considerations of racial differences, overlooked by them, which demonstrably operate to bring about diversity of social and legal systems and their developments. It is not true (as modern critical legal history has established) that social grouping everywhere evolved according to a uniform law from a primitive herd life with promiscuity of sex relations into matriarchal social systems, and these were naturally transformed into the patriarchal groups marked by absolute *patria protestas*; and that these again were everywhere followed by modern individualisation with gradual attenuation of the agnatic states and parental power. Nor is it true that, along with the above variation of the law of persons, the law of things started with communism in land in society, and evolved, by gradual steps, to individual and capitalistic ownership, transfer and contract. The ethnological jurists of the sociological school deny that the world evolution has been a universally uniform dialetic process. They also dispute the Marxian prognostication of an inevitable socialistic economy in the near future displacing the present capitalistic individualism of modern societies; and assert, following or supporting the older Historical school, that each different society and race has its individual and separate evolutionary history, and that many influences, including the racial, are at the back of this variation;

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[1] Fehr—Comparison of the Law of Hammurabi (B. C 2285-2242.) and the Salic law (A.D. 466-511)

[2] See Kuhlenbeck—Natural grounds of Law translated in Vol. iii, Evolution of Law series, p 352.

[3] Tarde—Les transformations du droit

and, further, that there is ample proof to corroborate that legal and social evolution is often not one of uniform forward movement but even backward and regressive.[1] External influences leave their impress on the evolution, but the same extermal influences produce different results in different peoples because of their different internal racial predispositions and aptitudes. Everywhere the evolutionary principles, of heredity, variation, struggle for existence, adaptation and survival of the fittest, have indeed their play, but the results are different ; for they depend not only upon the nature of the external influences but also of the vital reactions of the race which constitute the most important elements or materials of the evolutionary struggle. Contact with superior foreign civilisations and legal systems develops the resources of a virile race and improves and reforms its indegenous social and legal fabric, as was the case with the Roman Republic ; but similar influences would smother a weaker race and denationalise it.

Racial characteristics: their origin and influence.

The predominant racial characteristics of a people are no doubt themselves the results of complex natural adaptations through bygone ages; and their biogenetic and phylogenetic sources, buried in the depths of an almost endless past, may be untraceable; but the fact is, that, eventually, they form themselves into crystallised types, which, once formed, are not readily dissolved, and, in spite of, and through, a series of constantly changing subsequent external influences, continue to make themselves felt in the national institutions and laws. There was something characteristic in the Roman blood or race which distinguished the Roman people from the Hellenic or the Celtic peoples and left its impress on their brilliant social, political and legal institutions. The rare and peculiar characteristics of the Hellenic race, its liveliness of intellect, correctness of language, fine taste, &c., survived through many political disasters and foreign influences.[1] The Roman race was specialised in the direction of a strong conscience for the determination of right and wrong, organisation and self-control, capacity to rule and to assimilate foreign elements, etc., and practical common sense, which easily reconciled it to the principle of give and take and saved it from annihilation through a succession of difficulties and dangers. The Hellenic race was for metaphysical subtleties and aesthetic art; the Roman, for practical government and sound expansive Law. The Common Law, like the Roman, is full of points characteristic of the (Teuton) race which created it. It is remarkable for its combination of two mutually corrective principles—*viz.*, (1) regard for the individual rights protected by Law, along with (2) a recognition of the State's authority to enforce discipline and obedience within the limits of the law—one as a safeguard against anarchy, and the other against tyranny. There is, besides, as a natural consequence, a marked love of precision or exactitude in the delimination of the spheres of individual liberty and state control by Law investing it with possibly an excessive degree of certainty and uniformity which makes it somewhat conservative and less adaptable to changes than the other legal systems of Europe. It has led to the characteristic deference to precedents, respect for forms of precedure and precise formulation of rules of the English Common Law. There is a robust commonsense sternness and self-control in and about the legal system with which it upholds its impartiality, dignity, uniformity and certainty without allowing emotional impulses or deference to popular sentiment in concrete cases to override its sure and logical application and enforcement in the practical administration of justice.[1] The above salient features of the English Common Law have been, like all other legal systems, the product of the national

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[1] *Cf.* here the observations of Loria from the economic point of view

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[1] H. S Chamberlain, Vol iii, Evolution of Law series - p. 356 (note)

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[1] Bryce—annual address to the American Bar Association 1907, Vol. III, Evolution of Law Series, p. 368 *et-seq*

Racial characteristics in English Common Law.

character insensibly formed through several generations by the interaction of the original racial elements and the new influences introduced by the vicissitudes of fortune and foreign intercourse. The native characteristics of the Teutonic race, as evidenced by ethnic studies, were strength, resolution, wilful self-assertion tempered by a marked degree of self-control, conservatism and practical common sense, as opposed to the impulsive and speculative Greek, Slav and Celtic race-characteristics. When confronted with the growing despotism of the powerful English kings of the middle ages and the problem of adjusting conflicting claims and rights (arising out of the complicative feudal relations of lord and vassal) by definitely settled legal principles and securing a guarantee of impartial administration of justice free from any influence exercised by authority, the race produced its legal system and constitution, marked by its Magna Charta, its precisely expressed statutes and reports, its trial by jury, and its other distinctive features bearing clear marks of the racial factors that had worked out its form and contents.

Racial factors how sought to be utilised.

The Ethnological sociologists and jurists are naturally inclined to utilise these distinctive racial characteristics by encouraging races to develop along lines appropriate to each; and they recommend only selective ethnic combinations which, while infusing new blood with capacites wherein the nation is deficient, would not destroy its original racial aptitudes, and discourage an indiscriminate fusion of all mankind as advocated by Ratzel.[1] A more detailed examination of the proposed or suggested modes of combination according to ethnic and eugenic laws, likely to produce the best results, would be out of place in a professed work on jurisprudence. The gist of this is that the racial qualities of a nation are inherited from a bygone prehistoric past. They colour and characterise the national institutions and laws. They are changed by infusion of foreign blood and are affected, sometimes for the better and sometimes for the worse, by foreign intercourse and the accidents of external influence and history. A virile race would sometimes emerge victorious and more brilliant than ever, retaining the best part of its ethnic qualities, after a struggle with these accidents which would obliterate the racial identity of a weaker type of people. The laws and institutions of mixed races may be explained by reference to the racial qualities of the elements which entered into their composition. Among the chief ethological jurists who sought to find the first rudiments and foundation of Law by comparative ethological researches as to the history of the various

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[1] H. S. Chamberlain—Evolution of Law Series, Vol. III, p. 367.

The merit and defect of the positivistic ethnological studies.

legal institutions of the world may be mentioned the names of J. J. Bachofen (1815—1887), Hern, Post (d. 1895) and Leist (d. 1819). Kohler is also a leading star in the field of ethnological and ethnographical studies; but he belongs to the philosophical school. With regard to the purely empirical efforts of the ethnological and comparative jurists to reach the foundations of Law, which are affliated to the positivistic sociological group, Dr. Berolzheimer aptly remarks,—"By such systematic and comprehensive study the philosophy of law, as well as general legal science, has acquired a new method, comparable in value with that of comparative linguistic study to philology. Yet neither in philology nor in law can the comparative method be expected to provide a universal solution of problems. The peculiarly important philosophical problem of the origin of law and government, comparative law cannot be expected to solve, if for no other reason than that it ever finds the presence of law and government as a prerequisite for its study; similarly comparative philology cannot remove the obscurity attaching to the origin of language."[1]

Interconnection and interdependence of the above Sociological theories.

I have more than once emphasised the point that the sociological theories run into each other and are mutually complimentary. The geo-physical theories attach importance to the external environmental influences as factors of social evolution. The economical theories regard the economic necessities as the most potent forces in determining the structure and functions of societies as well as the forms and contents of Law. But one cannot fail to see, and, in fact, it is not denied, that economic conditions and necessities themselves are, to a great extent, born of geo-physical causes.

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[1] Legal Philosophies, p. 388.

(1) Of geophysical and economical theories.

(2) Of the above and biological theories.

Biological adaptations arise out of the reactions of the individual, or social, organism in its attempt to preserve itself against the hostile environmental forces of nature which are inwardly felt and reflected by the organism as economic or other necessities. Some theories look more at the external forces exciting the reaction of the organism, while some others occupy themselves with the organic adaptations or reactions themselves; but there is not much essential difference between them. Jhering had with his characteristic force drawn the attention of the legal world to the undoubted fact that Law was the product of struggle—continuous struggle at every step of its evolution from the very beginning; that the birth of Law, like that of man, has been uniformly attended by the violent throes of child birth. He had ridiculed the Savigny-Puchta school for having described it as a painless and peaceful process, like the formation and growth of language, by pointing out that each of the great historical achievements of Law, *e.g.*, the abolition of slavery and serfdom, the freedom of landed property and industries &c., had been the result of long and painful struggle against vested interests of the few in societies. Jhering adopted the Historical position that Law is a natural growth ; he accepted the Biological position that it is the result of struggle and survival, *i.e* , the survival of the form and adaptation best calculated to equip the society for its reactions aganist environments ; but he seemed to be the advance-guard of the group of jurists who inculcated the doctrine that this survival and adaptation is, in human societies, not an unconscious or merely organic process but a psychological process more and more conscious, voluntary, purposive, selective and intelligent as the organic struggle for existence becomes more and more psychic than merely organic. He justly denounced the practical teaching of the Savigny-Puchta School which deprecates legislation and feeds man with the hope that things will take care of themselves as they drift along the semiconscious current of custom shaping itself according to the "natural conviction of legal rights." Unconscious growth belongs to the vegetable kingdom and not to the animal, much less to the human societies. In human societies laws have to be evolved by struggle and conscious effort with a purposive end. Merkel (1836-1896) supplemented

The amplitude of Jhering's position; his adoption of mechanical and organic factors and advance beyond them to the psychological factors

Development of the psychological theories. Merkel: his 'compromise' theory of Law.

Jhering's idea of "struggle for law" by dilating upon the 'compromise nature' of Law. [1] Like Jhering he accepted not the causal but the purposive (psychological) view of Law, and of its origin and existence as the organ of social interests which are adjusted, after struggle, to a state of equilibrium by Law. In society, the competing interests of the various individuals and classes, as well as those of the state, are all to be represented by Law. Each set of interests seeks to have preponderating influence in the shaping of the Law and tries to gain recognition and support of the Law and of the organised force at its back. It is impossible for all these competing and opposing interests severally to have their fullest recognition and satisfaction; and so there must be, for the purposes of equilibrium, something like a compromise, or treaty, which keeps the balance till the power of the constantly changing relations in society again demands a resettlement and a fresh compromise. Law began with the trial of strength of individuals, *i.e.*, between the wronged and the wrong-doer. It next became their trial of strength, not physical strength, but strength of evidence, or proof, presented before the constituted authority, come in as the arbitrator. The mechanical

Struggle of interests in society is followed by a temporary compromise which is Law.

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[1] "Right and might" pp. 407-422 translated by Kocourek—Evolution of Law Series, Vol III, pp. 447 *et-seq* also "Elemente der Allgemeinon Rechsell, § 11.

Mechanical conception subsumed by the compromise theory. Law still regarded as the resultant of social forces (mechanical conception), but these forces are psychological and the resultant takes the form of an intellegent compromise

conception, of the operation of blind natural forces, in Law, is here magnified into social struggle of interests and their intellectual settlement by legislation backed by force. The Biological doctrine of natural selection also here receives its amplification as applied to human history. Bagehot had shown that civilisation is most clearly marked by increase of military power or fighting capacity of the nations. Nations that are strongest tend to prevail over the others: and in certain marked peculiarities, the strongest tend to be the best;[1] and similarly, inside a nation, the type or types of character which are strongest and the best prevail over the others. In the first step towards civilisation it was the strength, derived from combination and military discipline, that enabled civilised people to overcome the wild or uncivilised scattered tribes who were wanting, like the cyclops, in solidarity. Union, which is strength, is the result of training, subordination to authority or discipline; and the necessity of this union or discipline is felt through conflict which has the greatest causal influence in bringing about unity and civilisation. The conquered tribes were scattered and killed except those members that were amenable to discipline and assimilation and union with the conquerers. The mixed tribes that formed out of the union thus had the

Principle of natural selection (Biological) woven into the theory of compromise.'

Conquest of uncivilised scattered tribes by the civilised races.

Fate of the conquered tribes: the fittest are assimilated, rest killed or expelled; result—union of the best qualities of the conquerers and conquered strongest and best social elements of both, and heredity and association transmitted and fixed these qualities in the future generations. This discipline, which is the source of strength and civilisation, marks also the appearance of Law in the reign of customs. War or conflict thus leads to union and discipline, and custom, and Law. It leads further to conquest and mixture of races; and thus, to the formation of state, which begins after the stratification of society into two classes, the conquerors and the conquered, or the governors and the governed.[1]

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[1] Physics and Politics (1869) Chap. II.

Conflict leads to union or discipline; the latter to custom and Law.

The theory of State: it is the result of conquest and mixture of races forming different strata (rulers and the ruled) in the mixed society.

Thus we see sociological theories now accept, with modifications here and there as to the details, the general doctrine preached by Jhering that Law is derived from social struggle and adaptation. The Italian jurist Vaccaro[2] develops this doctrine, like Bagehot, by pointing out that adaptations, first made through stress of circumstances (struggle), are transmitted; and the survivors and the succeeding generations naturally become adapted to environments better than the previous members who had first acquired them by struggle. Custom, moral rules, and the Law, born of them, are all

2 Vaccaro.

Law the result of past adaptations (after struggle) recorded in human nature.

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[1] See translation from his works in Evolution of Law series, Vol. III, p. 473.

[2] *Cf.* also Gumplowicz and his followers whose theory of origin of states is tppical of the sociological theory in its mechanical aspect. See pp. 386—9 and also pp. 436 *et seq.* Merkel, Vaccaro, Richard developed the above idea by incorporating the biological and psychological factors as well.

experiences of the past adapations recorded in human nature. They all tend towards solidarity and sociality. A part of this social evolution is no doubt an organic and involuntary process; but there is, along with it, a conscious and voluntary process. In compound social groupings, born of conquest, the conquerors compel the vanquished races by laws to adapt themselves to the needs of the former; but in course of time the vanquished races, profiting by the association of the superior race, become stronger and force from the conquerors concessions—more equable and larger laws and even a participation in the government,—all of which have to be made for the sake of stability. Thus the struggle and adaptation become psychological and not merely organic. Merkel's idea of compromise, by which he supplemented Jhering's doctrine of struggle, is itself developed by Gaston Richard[1] who points out that Law no doubt appears as a compromise or arbitrament of conflicting interests (and he cites the Roman sacramental action in proof of his statement[2]), but it is as something more than mere arbitrament which induced individuals to accept Law and legal remedies as good substitutes for self-help or private revenge for the settlement of conflict. It is not the mere utility of social

The struggle and adaptation become psychological and not merely organic.

3. Gaston Richard develops Merkel's compromise theory.

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[1] "L'origine de l'idee de droit"—translated by A, Kocourek Evolution of Law Series, vol. iii, p. 485.

[2] See also Maine's Ancient Law, last chapter.

arbitrament or the calculation of self-interest, as Hobbes puts it, that inclines individuals to prefer the evils of obedience to the orders of a sovereign to the evils of universal war and leads to the legalised life of a social organisation; for man is not always an utilitarian being. It is rather the feeling and belief that society will vindicate the injured cause,—a feeling which is the outcome of the solidarity of the society itself. The society in offering arbitrament offers also a guarantee that justice will be done, that it will compel the wrongdoer to make atonement; and, in return, the litigants lose their power of withdrawing from the arbitration and settling the dispute by combat. The constraint upon the individuals to have their disputes settled by Law's arbitrament increases in proportion to the strength of the guarantee which the Law offers to vindicate the justice in each cause. The organised strength of the state, superior to the resistence of individual wills, is itself the highest guarantee of Law; and thus, the idea of the State, while it carries the implication of the guarantee, simultaneously implies forced arbitration and compulsory execution of judgments. These implications at first hesitant, when the State is weak, gather strength as the state becomes more and more organised and powerful.

The guarantee of Law.

It is extremely interesting to observe how the sociological theories of legal evolution

Sociological theories of legal evolution: development of.

Spencer's biological explanation of social evolution.

developed from the mechanical to the organic, and, then again, from the organic to the superorganic or psychological. I have already told you how Comte and Spencer had themselves admitted that State and Law are superorganic in their structure and functions, *i.e.*, they involve principles which go beyond those governing the lower vegetable and animal organic worlds. But in the elaboration of his Sociology, Spencer rather sticks to the biological principles and explains social structures and their growth strictly by the analogy of biological integration and differentiation. He points out the various items of this analogy, *viz.*, A—with regard to growth, (1) societies, like organic bodies, begin as germs and eventually produce aggregates million times larger than the original units or cells (here families or small wandering bodies); (2) the growths in aggregates of different classes are extremely various in their amounts, both in the animal world as well as in human social structures; (3) the growth of individual and social organisms are also analogous in so far that they involve, in both, an increase either (a) by multiplication of units, or (b) by union of groups, or (c) by union of groups of groups; and (4) in both organic and superorganic (social) growths the above processes may go on simultaneously; B—with regard to the structure, (5) the increase of mass is, alike in individual organisms and in societies, accompanied by increase (integration) as well as greater differentiation (into different organs with special differentiated functions) of the structure, *i.e.*, increased bulk is accompanied by increased or more complex organisation, *i.e.*, increased heterogeneity of the parts ; (6) the same general law governs this advance of aggregation and organisation in animal and social structures, *viz.*, that the " differentiations proceed from the more general to the more special ; first broad and simple contrasts of parts, then, within each of the parts primarily contrasted, changes which make unlike divisions of them, then within each of these unlike divisions minor unlikenesses, and so on continually " ; (7) organs in animals and organs in societies have internal arrangements framed on the same principle of mutual dependence and are inter-connected by ducts through which they carry help and sustenance to each other and remove and withdraw the products and excrescences of each ; (8) the three stages, (primary, secondary and tertiary) of the formation of special structural organs are seen in living bodies, as well as in societies ; we have for instance, first, a set of separate scattered cells, next, a corporate body of cells, lastly, a fully formed organ with one amalgamated duct communicating by smaller and finer channels with all the component cells of the organ in the historical evolution of the liver in animal bodies as well as of an industrial organization in society; and lastly, (9), we have a final phase of development in which the slow organic evolution of the preceding stages is replaced by a highly quickened and abridged process, and the fullfledged organ is directly established, sometimes, in anticipation of the needs of the whole body (individual as well as social[1]) which is in course of formation. We find, for instance, in the mammals the three stages of evolution in the formation of the liver, which go on successively in lower animals, are simultaneously hastened to form the fully developed organ[2], as we find, in the civilised states, the hotel, the church, the post office, *i.e.*, are built up simultaneously or even in anticipation of the town and the urban society about to be formed or instituted.

Spencer thus reaches up to the supreme height of organic evolution; but he failed to mark and punctuate this great difference between the natural biological construction of the animal body and the purposive psychological construction of the social body:—that the component cells of the organism are passive agents, whereas the individuals are not altogether passive in these latest stages of social and legal development.

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[1] As for instance a city going to be established at a locality.

[2] And more than that, in some cases all the necessary organs (digestive, respiratory and intellectual) are simultaneously formed along with the body

Theories of legal evolution.

With the increase of knowledge of the various sciences, through accumulation of facts, present and past, by research, the sociological jurists are gradually arriving at more complex solutions and rejecting the simpler legal theories of their predecessors. Sir Henry Sumner Maine, for instance, had laid down these general characteristics of legal evolution as evidenced by a comparison of ancient and modern law :—(1) In the domain of contracts (a) there has been a change from general concepts to special ones ; (b) the movement has been towards greater importance being attached to the inward moral essence of agreement than to the outward forms.(2) In human relations in general, the movement has been for status to contract. Recently R. de la Grasserie has summarised the evolutionary movements of Law in twenty-eight famous propositions, *e.g.*, 1. From Custom to Ordained (statutary) and Judge-declared Law. 2. From Oral to Written and to Codified Law. 3. From a Law of Nature to a Positive Law and a Law of Equity. 4. From Local to General Law. 5. From Simple to Complex Law. 6. From Material to Immaterial Law. 7. From Formal to Formless Law. 8. From Theocratic to Secular Law. 9. From Criminal to Civil Law. 10. From Civil to Commercial and Industrial Law. 11. From Political to Private Law. 12. From Collective to Individualistic Law. 13. From Esoteric to Popularised

Maine.

Grasserie's 28 points

Law. 14. from the Outward Act to the Mental Act as Creative of a Right. 15. From rights *in rem* to Rights in *personam*. 16. From a Law of Nominate Relations to a Law of Innominate Relations. 17. From Concrete to Abstract Rights. 18. From Immediate to Deferred Rights. 19. From Gratuitous to Commutative and Aleatory Transactions. 20. From Legal Regulation to Liberty of Contract. 21. From Unilateral to Bilateral Agreements. 22. From Family to Individual Rights. 23. From Ethnic to Territorial Law. 24. From Exclusion to Admission of Foreigners. 25. From a Law of Violent Methods to a Law of Peaceful Methods and of Equitable Aims. 26. From Oral to Written Form and the Return to Oral Form. 27. From Immoveable to Moveable Property. 28. From Reality to Fiction.[1] He hopes, in this, to have arrived at the sociological laws of legal evolution, by observation and induction, which will enable us to foresee the future of legal evolution by the application and extension of these pre-determined laws. His larger accumulation of facts enabled him to see, what Sir Henry Maine failed to notice,[2] that there are frequent regressions, backward evolutions, return to more primitive conditions; and that the evolution of

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[1] Les princepes Sociologiques du droit civil (1906) part II, ch. xx, trans. Vol III, Evolution of Law Series, pp. 575-576.

[2] Maine, however, points out one instance of such regression of the Roman Law of persons after its contact with ihe more archaic customs of the barbarians. See Ancient Law ,Ch. V.

Law was not a move in a straight line; nor is it true that it moves in a closed circle, for that would be no progress at all. He conceives that the movement of legal evolution is spiral, revolving like a screw always rising, always turning; for the regressions are only apparent or momentary till the next forward movement is taken up. Spiral, or screw-like, in its general direction, the movement has, moreover, its variations of intensity; for it is susceptible of accelaration, retardation, oscillation, even arrestment and resumption. Legal arrestments or stagnations sometimes take place after a span of forced activity, like the compilation of what is supposed to be an exhaustive Code or Digest, as was found after Justinian's compilations in Roman Law, and after the French Civil Code. Regression is seen in the backward movement of oscillation;[1] but it is sure

Arrestments and regressions of Law.

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[1] Students of legal evolution will find mnch useful information regarding this regressive and degenerative evolution in the International Scientific Series, No. 79 published in 1899 by D. Appleton & Company New York. Some selections therefrom are reprinted in Vol III Evolution of Law Series, pp. 542 *et-seq.* It is there pointed out (with illustrations drawn from the history of land tenures of different countries) that digeneration has always accompained evolution; the destruction of old institutions is involved in the formation of new institutions. In all transformations the change is always accompanied by an elimination of some parts, and, in the interests of the organism as a whole, these useless parts gradually degenerate. When a whole organisation begins to undergo retrogressive evolution and to decay, it is frequently in the interests of some still higher organisation. Some of these degenerated organisms are preserved by a natural law from dying out altogether, and, as in the animal world, so in the social, living and superior organisations and civilisations drag behind them a trail of debris from dead

Are followed by resumptions or the next forward movement.

to be followed up by the next forward movement (resumption) which takes the society and Law back again to the point of advance from where the regression began and, if there is no second regression, further still in the forward course which is resumed. Grasseri supports his 28 points as to the general forward directions of legal evolution as well as illustrates the various regressions, oscillations, etc , by a large number of accumulated materials drawn from the history, past and present, of the various legal systems of the world.

The loci of legal evolution.

The sociological jurists all see that the Law of human societies is a perpetual becoming and is not a stationery and permanent Law of Nature ; and they have never stopped in their search for finding out some law or principles of this irresistible change ; but each generalisation has been found on later research to be faulty. There have been schematic representations, made according to the principle supposed to have been discovered by induction, of legal evolution illustrating the theory of jural progress. The loci of legal evolution thus derived would, according to some, be a

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organisations and civilisations of lower and more primitive types as survivals. Spencer had also spoken of such survivals in Biology and Sociology. Degneration ordinarily takes the shape of going back to the more primitive stages of evolution So degeneration is retracement of evolution ; with this difference that the retrograded condition is atrophy, and does not contain the capacity to evolve which the primitive condition possessed straight line; and according to some others be an angled or undulating line, representing deviations and recessions, integations and differentiations; or a circle (Vico); or a spiral or helicoid line (De Greef) ascending over itself; or a rising spiral whose curve broadens as it rises (Goethe, Picard); or a parabola emerging from the mystery of the past and disappering in the mystery of the future. We have just now seen Maine and De La Grasserie also contributing their theories of legal evolution. Beginning from Comte's formula of social (including legal) evolution through religious, metaphysical and positivist stages, we have a long series of formulas. But the growing collection of facts and figures day by day tends to prove that these theories and schemes are only correct, if we leave out of account the heterochronisms, hiatuses and deviations which cannot properly be accounted for by the schemes; for, inspite of all researches, mechanical, biological, racial and sociological, as Picard points out [1], "The past of Law, as it is known to us, is too short; the visible curve of jural forces is but a small fragment of the whole. Its beginning and its end are alike wrapped in obscurity. No positive projection of its entirety can be calculated. History (as some sceptic has wisely said) may be perhaps no more than a momentary deviation

Variety of attempts to describe theory.

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[1] Piard—Le Droit pur (1910) pp. 155, 157 translated by Wigmore, Evolution of Law Series, Vol. iii, p. 678

which we mistake for a part of the normal line of evolution. Is Law's path, as we see it, merely that of a wandering comet, or that of a harmonious planetary system ? Law, and the innumerable legal systems which go to make it up, abounds in accidents (as languages do) which deviate from logical symmetry. The irrational (or what seems to us as such) plays a vast part in the operation of the cosmos, and is the most misleading of its enigmas."

The irrational element in cosmos baffles all generalisations.

I have spoken above about the planetary theory of the Law's evolution. Taken simply, it may mean nothing more than this, that as the paths of the planetary bodies represent the resultant of the centrepetal and centrifugal forces opposing and restraining each other, so the evolution of Law is the resultant of the conflict of economic and other social forces operating upon the society and its individual members. Well, this is, in that view, a schematic representation of the mechanical theory of society and Law—one that may take its place along with those which I have sketched out above. Prof. Wigmore, however, develops it in a deeper sense[1], in course of which he points out that the theories like that of Maine and De-Grasserie are defective ; that they ignore, and do not explain, local variations ; and hence fail to represent the whole truth. They overlook the

Wigmore's theory of legal evolution represents a cry of despair.

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[1] Problems of the Law's Evolution, pub. Jany. 1917 in Virginia Law Review IV, 297 reproduced in Vol. iii, Evolution of Law series, P. 531.

innumerable special factors and forces which are not covered by their accounts but have nevertheless their effect on legal evolution. They further assume, and wrongly so, a degree of constancy in a specific legal institution (as scientists assume a constancy in the proportion of physical and chemical forces and elements) whereas no fixed tendencies in legal ideas have been proved to exist. They further assume, and again wrongly, that the formula of evolution is universal, *i.e.*, applicable not merely generally, *i.e.*, with respect to the main trunk ideas of the Law, but also to each and all specific branch ideas as well. Prof. Wigmore proposes to describe legal evolution by the analogy of planetary motion in space simply with a view to emphasise that as the heavenly bodies, in their perpetual motion through space, describe curves which are inconceivably complex on account of the innumerable forces acting upon them, so does the evolution of Law and legal ideas describe an exceedingly complex curve as it is affected in its progress by a large number of forces, great or small, acting in opposition or in harmony, some here and some there, in the different parts of the land, in different countries, and at different times. Simple lines and curves are therefore too inadequate to represent the path of legal progress.

The extreme complexity of the curve of legal evolution and its reason.

You will thus find that apart from the voluntary element of legal evolution, which the

Services of Sociological Jurisprudence of the scientific type.

sociological jurists at first overlooked[1] under the influence of positivism and which still more complicates the difficulty of solving by scientific induction the problem of the foundation, origin and development of Law, Sociological jurisprudence, from its mechanical (including economic), biological, and ethnological standpoints did not go further than partially tracing some, but not all, of the many hitherto unnoticed complex influences and forces of various kinds which affect the development of Law. They found that with increase of knowledge the difficulties were magnified; and the search of the sciences for the ultimate truths remained as hopeless as ever. Sociology found out that struggle and conflict of forces and interests are at the bottom of Law and its development. It also acknowledged the biological or organic nature of Law and legal growth. The nature of these forces was scrutinised; the economical, racial, religious, constitutional or political, and psychological factors were studied with care; and a Jurisprudence was built upon that which, after all its stupendous efforts, acknowledged that the task was yet incomplete. The common ends and conclusions to which these divergent sociological theories point, may be summed up in the language of Prof. Del Vecchio thus—"They are . . . . . . first of all, the concept of the interpenetration of all social facts so that it is impossible, for example, to study the Law of a given people in a given time apart from all other subjective and objective conditions of its life. Then comes the concept of the natural determination of social facts so that the appearance and duration of an institution are explained in relation not so much to its ideal and abstract rationality as to the actual presence of vital forces capable of forming and maintaining it (we may call it the principle of sufficient historical reason); and, lastly, there is the conception of development or growth (to which everything in life is subject), which proves that Law has a life and must transform in time with the modifications of the conditions of existence with which it is connected."[1]

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[1] Prof. Small (General Sociology, P. 82) says.—"While the Spencerian influence was uppermost, the tendency was to regard social progress as a sort of mechanically determined redistribution of energy which thought could neither accelerate nor retard."

Its attitude towards and explanation of the psychological factors.

Some of these factors and forces that admittedly take part in bringing about the evolution of Law, *e.g.* religion, sympathy, education, are decidedly psychical or conscious in their character. The early sociologists and sociological jurists either ignored them altogether, or treated them as mechanical or physiological (organic) forces on the assumption that they are more representations, in consciousness, of organic sub-conscious processes going on in the body by way of biological reactions against environments.[1] The developments of modern physiological psychology, however, established a more intelligible scientific explanation of psychic phenomena, especially, of free will and voluntary action ; and thus thinkers and jurists devoted to the solution of the sociological and socio-legal questions, who were not quite satisfied with the natural and bio-organic explanations of them, and who had to admit the potency of the voluntary effort of the will in the making and development of human institutions, tried to secure, from this newer psychology, a mode of reconciling, to some extent, the ever unreconciled schism between teleology and causality, free will and determinism, or between Law as found, and Law as made. The new psychological jurists, who may be indirectly or remotely affiliated to the social utilitarian school of Jhering, came in the wake of the schools of sociological jurists dealt with in this lecture ; and their contributions to the science of jurisprudence will be discussed in the next[2].

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[1] Formal Bases of Law Vol. x, Legal Philosophy series, P. 56.

In concluding this lecture, I may usefully quote here the pregnant remarks of Dr.

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[1] And thus their opposition to the philosophical and idealistic schools was, like that of the older empirical schools of Locke and Hume, open and irreconcilable.

[2] The sociological jurists who have been noticed above in this lecture as recognising the operation of psychological factors in the evolution of Society and Law have indeed ,some affinity to the Psychological School referred to here , but they belong to different camps.

Its salient points.

Berolzheimer[1] on the salient points of the newer theories evolved by sociological jurisprudence. "The sociological school that developed upon the basis of the doctrines of Comte and Spencer makes man primarily and distinctively a social being, a member of a component community. Its position stands in direct contrast to the individualistic trend which attained its marked development in the 17th and the 18th centuries. For Hobbes, Rousseau and other adherents of Natural Law the fundamental problem was this: What disposes men collectively to form a State and subject themselves to governmental coercion? The sociologists frame or rather answer the question from a different standpoint. They reply: the State is not formed by the combination of individuals, but at the outset men are naturally united in larger and smaller groups. Like many types among the higher animals, primitive men formed a gregarious band. It is the merit of sociology to have established this generally accepted view of prehistoric life and to have appreciated its significance. A further distinction of sociology—though this is limited to Gumplowicz and his followers—relates to the manner in which the state presumably arose. It is held that the means by which the larger collective associations in primitive culture were maintained, up to the point of their consolidation into a State, were those of conflict,—a struggle and rivalry for power. Such an antagonism between the two groups, as hordes, tribes, or the social aggregates leading to the relation of master and servant, forms the underlying situation leading to government. Such antagonism may be more or less pronounced; the exploitation of the enslaved by the dominant class may be regulated by law, or it may be the result of social or economic circumstances; at all events, there remains a more or less shortly defined dualism separating the state into strata, and this fact is emphasised by the sociological theory of the formation of the state. The individual is represented as withdrawing in favour of the class and as completely absorbed by it, intellectually, socially and politically."[1]

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[1] Legal Philosophies, p. 351.

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[1] It will be noticed that I have given to "sociological theories" and 'Sociological Jurisprudence' a wider meaning than is given by many others including Dr Berolzheimer. I attach greater weight to the sociological 'tendency' which now characterises all the schools, and, in my view, all the modern schools and theories are more or less sociological. I have sometimes called the scientific class or school of jurists having this tendency as belonging to the "sociological school proper" as opposed to the philosophical jurists, many of whom are, in fact and truth as much sociological as their scientific or positivistic colleagues in the field of juristic thought

LECTURE VII.

THE EVOLUTION OF THE PHILOSOPHICAL THEORIES UNDER THE INFLUENCE OF THE SOCIOLOGICAL TENDENCY.

The Social Philosophical Theories and Schools.

Influence of positivistic sociology on philosophical jurisprudence.

While the progress of Sociological thought along the line of positive philosophy was remodelling the older (individualistic) Analytical and Historical Jurisprudence, the Philosophical school of jurists did not remain unaffected by its influence; and presently there appeared amongst them a marked tendency to revise and reconstruct their theories by utilising what they conceived to be the abiding contributions of Sociology to the moral and legal sciences. Modern Sociology above all established that all social phenomena are real and inter connected facts of nature, *i.e.*, of social life; and they have got to be studied scientifically, in all their historic phases and comparative aspects, with reference to all the different objective forces and influences of which they are the resultant products. It justly demonstrated the fallacy and inadequacy of the attempts of the Philosophical School to explain them all by the Euclidean method of abstract logical deduction from a few apriori general principles. The doctrine of Law of Nature scarcely explained, while it deprecated, what *is* the actual Law (positive law) while it elaborately philosophised on what should be the Law (the ideal law or natural law). The Metaphysical School concerned itself with the Law as it is and as it changes, andsought to find in the evolutionary forms of Law the progressive realisation, according to some rigorous and logical formulæ or dialectic process, of some fundamental absolute metaphysical reality, principle or idea. It needed no greater effort on the part of the positivists to demolish this philosophy of evolution according to transcendental logic, than was required for the demolition of an absolute and eternal Law of Nature.

Defect of purely scientific methods in the investigation of psychic and moral phenomena.

Philosophical Jurisprudence accordingly turned to a more realistic line of research and thought, towards a more intimate study and explanation of the concrete and shifting facts of social and juridical life. That it survived the on-slaughts of Positivism and modern empirical Sociology is due to the great want or defect of all efforts to build up along purely empirical lines a complete science of phenomena which are not simply physical or chemical but include also the psychological and moral. Positivism cured Philosophy of its defect of neglecting what "is"; but Philosophy was required to cure Positivism of its defect of neglecting what "should be." For social, moral or legal rules are essentially not simple descriptive summaries of existing facts but are declaratory of courses of conduct as are supposed to be proper or just. You may scientifically account for the present social arrangements and rules by giving a list of geophysical, biological, ethnic, economical, social and other antecedent forces and influences which are causal; but you cannot avoid a critical examination of them, as they are, with a view to ascertain whether they are just or proper. The philosophical jurists now devoted themselves to this question of the standard of right or justice with reference to which the existing institutions and rules must be tested and to the critical examination of the theories of Law and Justice supplied by the various grades and subdivisions of empirico—Sociological Jurisprudence as they successively appeared. The ultimate testing of right and justice by 'Nature,' 'Reason' or some such fundamental idea or first principle which philosophy in some form or other always upholds is thus set against the canons or formulas derived by inductive science such as, command of the sovereign, 'utility,' 'social interest or purpose'; and the recrudescence of Philosophic Jurisprudence in these days of supremacy of Science proves that the necessity of some such absolute standard has not yet been removed or satisfied, and that the modern efforts to offer empirical substitutes for the same have not yet been thoroughly successful.

Continued necessity and function of philosophical jurisprudence

Criticism of the purely materialistic and empirical theories of Law evolved by the scientific school.

Classification of social philosophical schools.

It has been the practice to classify the Social—Philosophical schools into three groups:—(1) the Social Utilitarians headed by Jhering, (2) the Neo Kantians headed by Stammler, and (3) the Neo Hegelians headed by Kohler and Berolzheimer. The members of the first group are most realistic in their tendencies; and their superficial philosophy, which takes psychological and moral facts at their face value without any searching enquiry into their fundamental and metaphysical nature and foundation, makes them practically a separate group by themselves, standing between the philosophical and the positivistic Sociological jurists, and influencing both to approach and meet each other for the solution of questions which require scientific generalisation from facts of experience as well as metaphysical principles for their correct and reasonable interpretation and appraisement. I have accordingly placed and discussed Jhering in the last lecture; and we shall see how his writings inspired the later sociologists and sociological jurists of both camps to meet each other in the plane of psychology and teleology. I shall accordingly leave the Social Utilitarians here, with this remark, that the doctrine of social interest, of which they are the leading exponents, is affiliated, and co-ordinated, by them to, and with, the older 'individual utility' of the school of Hobbes and Austin by the

Social utilitarians come midway between truly scietific and truly philosophical schools.

Their doctrine of "social utility" how co-ordinated with the older doctrine of individual utility.

demonstration of the sociological truth that the harmony of individual and social interests is calculated to foster both, and their antagonism adversely reacts to the detriment of both ; and that the main object and function of Law is to secure the harmony and co-ordination of the two which constitutes morality. Vices are antisocial impulses (Shaftesbury) ; and, though prompted by self interest, disturb the individual well-being as well as the welfare of the community. The philosophy of Social Utilitarianism is thus the socialised and more enlightened form of individual utilitarianism ; and this is the reason why social utilitarianism has, as we have seen and shall see further hereafter, resuscitated in a modified form the Analytical theory of Law as a coercive norm instituted teleologically for the purpose of the perfected socialisation of the individuals, and by that as the means, for the achievement of social ends.

Theory of social utility is not truly philosophic , materialistic utility cann be the primar end of Law.

The true philosophical jurists, however, will hardly accept this position. For, according to them, the ideals of justice and of morals (right reason), and not materialistic utility or teleology, are, and have been, in all stages the controlling factors of the development of Law. Individual and social welfare will come in as necessary corollaries of right and justice ; but they cannot be made the primary end or object of Law. The object of Law is the attainment of the ideal right and justice, though this ideal

The Neo-Kantians

Ideal right and justice is the true philosophic object of Law This ideal is relative to and changing with concrete social situations

is not, as the older philosophic jurists tought, an absolute, abstract and permanent unchanging ideal but one that is relative to the real concrete situations in society and changing with those social situations. The Neo-Kantians thus, with a true philosophical method, pursued the investigation of this relative ideal; and sought to purge the Philosophy of Law of its merited calumny of over speculative logicality and abstraction,—to secure for it a greater intimacy of touch with the realities of life and to make it a useful guide and critic in all matters of juridical and legislative theorising and their practical adaptations for the constantly arising new needs and problems of modern societies.

Kant's exposition of the moral law and its implications.

Kant had in his epistemology established that the soul (the immaterial, immortal indestructible psychic, that is, conscious and thinking, substance), the world (as a synthetic totality of external substance which constitutes the unity of all phenomena and existence behind them), and God (or the ultimate condition of the possibility of all things), are incapable of logical proof, and thus demolished the rationalistic philosophy that preceded him. He however sought to base their reality on moral certainty and their accessibility to the practical reason or will; and, in his exposition of the postulates of practical reason, he attached the greatest prominence to the moral law which, according to him, is the one perfect law or rule—the one categorical imperative—universally binding on every rational will; a rule determined not by any external or limited interest whatsoever but by the spontaneous commandment of the one autonomous universal reason or will. This moral law demonstrates the freedom of will; for without such freedom its dictate "thou shouldst" would be unmeaning. The universal ideal of all right action is to act according to the dictates of the rational will, which is free, that is free from all sensuous matter of desire; for such action alone would be true to the real autonomous nature of the will. Turned towards concrete volitions and activities, the moral law or ideal yields the maxims of positive morality and negative legality which, as we have seen in Lecture II, direct a man to behave in ways that may be universally adopted by all. Thus in Kant's philosophy felicity, utility, sensuous inclination, and all such material motives of human action are made to yield place to the autonomy or freedom of the rational will, as the pure, yet self-centred, ideal of its own volitions, which is, at the same time, on account of its purity, the universal ideal of all volitions of all individual wills.

Defect of Kant's legal philosophy—eschewing of material motives altogether.

In summarising Kant's contributions to the philosophy of Law, I had omitted to mention what was then not so much necessary for the elaboration of his formal theory of Law, Hint supplied by Kant's philosophy itself for the synthesis of causal and teleological factors of legal phenomena.

namely, his views regarding the position of teleology, purpose or adaptation to a given end, in nature and in human volitions. Naturalistic (*i.e.* empirical and positivistic) researches look only for causes of things and make up descriptive sciences only. They ignore or minimise teleology as a determining factor of things and events. The older rationalistic philosophy, however, while admitting material antecedents as causes, also admitted 'purpose,' 'motive' or 'object,' 'the end in view,' as a (final) cause, having, like the causal antecedents of the naturalists, also creative impelling force and capable of producing events, acts and phenomena. Kant, in his "Critique of Judgment," disposes of this debatable question by admitting both kinds of causality in the world. In some cases, as in the inorganic world, a thing may be the result of causes wholly foreign to the use to which it may be put as a means towards a given end. The sand in the sea-shore may be useful for the growth of the pines; but the causes which produced or created the sand may have been wholly unconnected with any design or object of nourishing the pines. But in organic nature the parts of an organic body are so patently subservient to the whole as means to the end that teleology or design cannot be eliminated as a causal factor in their creation. But this[1] is due to the limited and conditioned character of our understanding. We, in order to comprehend things, synthesise them sometimes with their antecedent causes, sometimes with their future uses, and sometimes with their co-ordinate parts and wholes and bring in aid the notions or categories of causalty or teleology for the purpose. "Were there however an intuitive understanding which would recognize in the universal the particulars, in the whole the parts, as already co-determined such an understanding without resorting to the notion of design (or even to the notion of causalty which is eager to synthesise things with their proximate pre-existing antecedents) comprehend the whole of nature by reference to a single principle."[1]

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[1] *i.e.*, the apparent diversity and incongruity of principles.

The task of the Neo-Kantians to supplement Kant's idealistic philosophy of moral law by an explanation also of the concrete legal and social facts and for that purpose to take into account both causal and teleological factors in that evolution.

The Neo Kantians thus had before them the task of synthesising, for the explanation of the evolution of Law and social phenomena, the casual factors of this evolution as ascertained by the new scientific (sociological and positivistic) investigators, and the teleological efforts of human volition to aid and guide this evolution for the furtherance of proximate purposes (in the shape of social interests) and ends paraded by the Social Utilitarians as the 'final' causes of the evolution. They had further to reinterpret what they conceived to be the true philosophy of Law as laid down by

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[1] See Schwegler—Philosophy, pp. 241 *et seq.*

Kant, based on autonomous reason or will, in terms of modern Sociology ; and to subsume all the best contributions of the modern sociological sciences and theories under that universal philosophy of reason. It was necessary to revive the formal theory of Law and make it acceptable to modern conditions.

They reconciled Kant's philosophy of Law and modern science.

Kant regarded the realization, by the autonomous free self, of its universal free and autonomous nature as the final end or purpose of all moral endeavours. Modern science, on the other hand, tended to establish that the individual self is really the product of antecedent social forces as causes and is a changing evolutionary entity passively swayed by material and objective interests and passions. The Neo-Kantians (H. Cohen[1] b. 1842) recognized that the individual self taken singly is not free, but is subject to the law of causalty, that is, to the causal influence of his environments affecting him objectively with pleasure or pain which determine his activity ; but that is only the description of the self as it is, or rather appears to be. Moral endeavour, however, must presuppose an ideal, and the power or capacity of the will to reach it by rising superior to the objective influences of pleasure and pain ; and true philosophy points only to the formal ideal of pure autonomous free will as the only one that serves as the common ideal for all individuals. Any other ideal, purpose, end or interest, more material and objective, can never serve as the common universal ideal for all humanity. The final end of all Law and Morality is a free purified humanity *i.e.*, a community or brotherhood of autonomous beings in perfect harmony with each other (on account of the freedom of each from the bondage of objective material desires which alone are productive of conflict and discord). In the present moral status of man this ideal is far from being realized; and, indeed, the upward march towards the moral ideal is perpetual and infinite. Positive, *i.e.*, punitive, Law and Government will therefore ever be required to frame and enforce rules, which have this true ideal in view, and thereby to guide individuals in this path of morality and progress. You may thus see that the sociological conceptions,—that the individual is a social unit; that he is a product of social forces and can realize himself only in and as a part or member of the social fabric; that the apparent interests of the individual, if they clash with the interests of the community as a whole, must be sociologically unreal and illusory; and hence, that the general *form* of the law, if not the greater and more useful part of its contents, must primarily have in view the common social interests and ends as ideals—are here accepted

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[1] Harman H. Coben—Kant's Theorie der Eftahrung quoted in Berolzheimer, pp. 393 *et seq.*

The Neo-Kantian theory compared with the positivistic sociological conceptions.

by the Neo-Kantians. They further admit that the moral status reached by man in different ages and societies is not the same; and the ends, motives, purposes and intents held up by Law as concrete ideals of moral endeavour must also vary from time to time to suit the moral capacities, tendencies and immediate requirements of such ages and societies; but all the same, they point out that beside the material ends and purposes (the immediate and relative teleology of the present), which the Social Utilitarians would have as the ideals of Law, there must be a formal, universal and ultimate ideal or criterion of justice, to mark, weigh, or test the quality (just or unjust) of every concrete individual legal system, principle or rule, without which the empirical or pragmatic determination of the proper and true law would be hopelessly capricious and uncertain. True Philosophy must therefore guide, supplement and assist the correct formulation, appraisement and application of the Law by supplying the true ideal of justice so that the justice or legality of the material ideals, set up by the sociologists, may be conducive not simply to the social interests, which are uncertain or changing, but also to the furtherance of the philosophically ascertained universal and ultimate goal of all individual and social life and progress, wherein all interests and right kinds of justice meet.

Material ideals and their testing by the true ideal of justice.

The Neo-Kantians point out that this ultimate and philosophic test of right and justice, which can never be dispensed with in Law and Jurisprudence, has either been left (*e.g.*, by the Romans and the early Rationalistic schools) to rest on vague indefinite conceptions of "good faith," "equity," "natural reason," &c., based on individual feeling, or (*e.g.*, by the empirical jurists) to the equally uncertain and erroneous 'balancing of interests,' 'general utility' (individual and social) dependent on pleasure and pain. The philosophical jurists, (*e.g.*, Kant and his successors) had indeed searched out and advanced such a test on the basis of philosophic reason but they had proceeded further to supply an eternal code of legal rules (Natural Law) for all societies and times; thus confusing the *form* and the material *contents* of Law and ignoring the difference between ideal and relative justice. There has thus been either a neglect of the form (or the ideal) in favour of the relative and evolutionary social facts and situations, or the opposite. A true philosophy of Law must take account of both and seek to find the ideal through the actual and supply principles and tests to bring the latter into conformity with the former.

Rudolf Stammler[1] is the leading exponent in France of Neo-Kantianism which was introduced in Germany by Cohen and Natrop. He

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[1] (b.) 1856, his most important works·–I. Wirthscraft and Recht. 2 Die Lehere nou dem Rectelegen Rechte which has been

Stammler's services to jurisprudence.

brings philosophical jurisprudence down from its abstract metaphysical heights, *detatched* from the real and concrete relations of the world, and interests it in the practical work of sifting the element, and supplying the test, of justice in the positive rules of law and in their application for the determination of concrete questions, arising out of conflicting material interests, of everyday life. He further socialized it, not however, as proposed by Jhering, by making the social welfare, that is, the welfare of all, the standard of individual conduct, but by substituting a socialized from of the (Kantian) ideal of autonomous will as the ideal of all legal regulation and human conduct. Kant had proposed individual freedom, or autonomy in the highest sense, as the end or object of Law; and his doctrine of maximum liberty for each individual was sociologically defective and unsound in as much as the causal and necessary dependence of the individual on the society was not sufficiently taken into account. Kant proceeds from the individual to the universal: he reaches the ideal of universal freedom for all by integrating the freedom of each individual at which he primarily aims. Fichte in fact lays greater stress than Kant on the indispensibility of a free community of men for the fruition or realization of individual

Stammler contracted with Jhering.

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translated into English as Vol. VIII of the Legal philosophy Series and 3 Theorie der Rechts usaen cheft recently published in 1911.

freedom, and in this he comes closer to Stammler than Kant. But Fichte also was an individualist. In his legal philosophy, as in Kant's, the community becomes free because each individual therein attains maximum of freedom. Stammler, imbibing a true sociological spirit, puts the community and its perfect autonomy in the foreground as the ideal of law and morals, and deduces his maxims of justice directly from this socialised ideal of communal equality and freedom. A law would therefore, according to this Neo-Kantian doctrine of freedom, be tested not by the question whether it restrains individual freedom, for it must do so in some shape or other, but whether it is calculated to further the realization of a free and autonomous community as a whole. The justification of legal regulation and co-ercion, according to Kant, was the provision (by delimitation of the respective spheres of free activity of each) of a field of free activity for the individual without external interference; but according to Stammler the justification lies in its usefulness and necessity as a means to the establishment of (social) order in the social life of man provided such order is calculated to secure mutual co-operation and good will by which alone the final self-contained end of social life in a community of equal and free agents may be attained. Neo-Kantianism thus becomes the sociological version of Kantianism; the end

Kant and Fichte compared with Stammler.

The justification of Law

in itself, the final goal of Law and Justice, is the realization of the autonomous self (Kantianism); but this self is not individual but social (Neo Kantianism). The individual self and its interests, including its freedom or autonomy (or to put it in other words, its freedom to pursue its own interests), are subsidiary ideals in so far as they subserve and foster the social or communial interests, the communial freedom and equality (fellowship). The former must not he arbitrarily subjected to restraint or co-ercion; nor should the individual be arbitrarily deprived of, or excluded from, the common advantages of social life. Such restraint or exclusion, by Law, can only be justified by the superior necessity of furthering the causes of the great social ideal. But under no circumstances must the new law, by its co-ercion or restraint, tend to create a general inequality of the members and disturb the fellowship of individuals in the community; for that would be going directly against the social ideal by which alone Law must finally be tested and justified. Law must in every case be such that it binds all members in common fellowship and equality, the sovereign and the subject, the ruler and the ruled, the obligor and the obliged, by a common rule of conduct; for otherwise it becomes arbitrary. It must tend equally to induce a general.[1]

The great social ideal: communal fellowship and equality.

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[1] Wirthscraft & Recht, pp. 263 *et sq.*

respect of the members for the inviolability of individual freedom as also a general tendency and [1] readiness to cohere and participate in the common social burdens as well as the social profits and advantages; for these two are the principal elements that contribute to social fellowship and autonomy. We have thus the four cardinal principles or tests of justice in Law :—

The four tests or principles of justice.

1. One will must not be arbitrarily coerced or interfered with by another in society.

2. No one is to be arbitrarily excluded from the common advantages, (*i.e.*, of social life).

3. Every legal demand can exist only in the sense that the person obliged can also exist as a fellow creature.

4 Every power of control conferred by Law can be justified only in this sense that the individual subject thereto can yet exist as a fellow creature, or in other words, under no circumstances should a legal advantage, right or claim, or legal authority, or power of control as superior, be allowed to confer such a position of privilege or vantage on the favoured party, as against the obligee or inferior, as to create or recognize a permanent and real inequality between the two wholly inconsistent with the social ideal of autonomous fellowship.

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[1] Lepre Vou. dem richtegen. Rechte, pp. 208—211.

Stammler's criticism of postivistic sociology and jurisprudence.

Stammler sets the realization of the ideal social life as the supreme problem and end of justice through Law. Law is only one of the agencies for the realization of the ideal. The true character of justice, which is the object and test of Law and through which the social ideal is sought to be established by Law, is to be determined by the philosophi cal study of this ideal and not by the empirical historical examination of, and inductions from, the actual material phases of Law as conditioned by the different societies in which it is manifested as legal rules; for such induction would yield only the causal material antecedents of legal phenomena and not their teleology on which alone the true character of justice can be philosophically investigated.[1] Sociology cannot be assimilated to the natural sciences; nor Law and society to physical laws of nature and mere physical gregariousness. The distinctive characteristic of the former lies in the artificial and voluntary regulation of social life by laws made with a purpose, *i.e.*, in its teleology. Law and its essential element of justice must therefore be looked at from the point of view of its ideal and object (that is, philosophically), and not for that of its origin or causes. Stammler agrees with Jhering in regarding Law as a means to an end; but Jhering was unphilosophical in regarding

Jhering criticised.

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[1] This point is made clearer by Del Veccho, See Lec. VIII.

teleology as a phase of causality and in ascribing to the ideal, or end in view, a causal or creative force. Law develops through phases under the influence of material social causes and conditions ; and these conditions more or less impose limitations on the ideal autonomous nature of man, and along with it, limitations on the Law's capacity to reflect and realize the justice which is to subsist in that ideal social life. Philosophy of Law has therefore the task of laying down not the perfect Natural Law as it is to subsist in the ideal society that is never actually realized, for that would be wholly fruitless, but of finding the true tests by which the element of justice in existing laws can be ascertained in their concrete applications amidst the varying conditions and limitations of actual social life. Man in society is not actually autonomous but aspires to autonomy as the ideal Nor is man perfectly socialized so as to voluntarily participate in all social ends and social duties. He is swayed by external objective interests and passions which enslave him, introduce conflict in society, and prevent the realization of the ideal. Concrete laws in each society can not ignore the conditions and limitations, which are different in each, and must adapt themselves to them ; and at the same time they, by a slow process, should seek teleologically to bring about, by compulsory regulation

The true function of Legal philosophy.

Autonomy and socialisation must go together.

of external conduct, a higher life of autonomy and socialisation. When this tendency is noticed in Law and in its application, it is just so far as the particular society is concerned ; so justice in Law is relative to each society and its material conditions and needs. Philosophy of Law has therefore to deal with Law of Nature with a variable content—*i e.*, not merely with the permanent and abstract forms of justice and law, but with reference to the variable contents and materials to which Law and its concrete administration must be adapted so as to yield the best possible relative justice, under the circumstances, furthering autonomy and fellowship of the members in each society.

Law of Nature with a variable content.

Roscoe Pound's summary.

Prof. Roscoe Pound thus summarises the services of the Neo-Kantian School, as represented by Stammler, to the cause of sociological jurisprudence[1] : —

> (1) Like Jhering he gives us faith in the "efficacy of effort," as Ward happily puts it,[2] and furnishes a philosophical foundation for the conscious endeavour to promote social justice in which the sociologists rightly demand that the science of law as well as the science of legislation should co-operate.

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[1] Har. 25 L. Rev. 154. 2. Applied Sociology, Ch. II.

(2) He puts a social philosophy of law in place of the individualistic philosophy theretofore dominant and formulates a legal theory of social justice.

(3) He adds a theory of just decision of causes to the theory of making just rules and thus raises the important problem of the application of legal rules.

I may add that the proper appreciation of this last item of service rendered by Stammler is necessary for a true estimate of the value of Neo-Kantianism in the history of legal science. Justice of a thing, as now pointed out by Stammler, is to be found in its adaptation to the cause of the ideal of social autonomy. If it is a rule of law, its justice will depend on its being calculated, if generally applied for the regulation of human conduct, to introduce a social order in which the individuals will be more autonomous as well as more socialized. If it is a concrete decision in a particular case, the same test must be applied, namely, whether, in view of the particular circumstances and conditions affecting the parties, the situation in which the parties are placed after the decision is more adapted to promote the ideal. It is clear therefore that 'Law of Nature,' attuned to justice, has a variable content, which is variable not only for different societies but

The test of justice in the administrator of Law.

for different parties and circumstances in the same society ; and a rule of law may work out justice as well as injustice when administered mechanically and without necessary adaptations in view of the particular conditions of each case. Justice is therefore for the first time prominently placed higher than Law as the end which Law must always have in view ; and the science of Jurisprudence is made to change its angle of vision and strike out more for justice through Law than for Law itself. Stammler substituted for Kant's formal theory of Law a formal theory of testing the element of justice in positive laws and in their particular applications ; a theory of what is just in Law and its administration relatively to the present material conditions of social life ; a theory of legal justice which is growing with the growth and amelioration of social conditions ; *i.e.* A Naturallaw with growing or variable content instead of a theory of Natural law which is eternally just.

Prof. Saleille's development of the Neo-Kantian doctrine.

Prof. Saleilles took up and further developed, in recent times, the line of thought introduced by Stammler and clearly explained that the measure of justice to be reached and realized by Law at each era and locality is variable. For the justice to be reached is not one ideal and absolute justice but social justice in conjunction with social order ; and the measure of that justice varies, first, with the requirements of the particular facts and circumstances obtaining at each age and in each society, and, next, with the ideas and conceptions prevalent in the society at the time regarding the nature of the justice that should prevail; so that the claims of the various opposing and conflicting forces and interests may be suitably adjusted in view of their proportionate magnitude and importance. I quote here his own words translated into English.

"What does not change is the fact that there is a justice to be realized here below, the sentiment that we owe to all respect for their right according to the measure of social justice and social order. But what shall be this measure, what shall be this justice, what shall be this social order? No one can say apriori. All these questions depend upon certain social facts with which the law comes in contact. These facts change, evolve and are transformed. But that depends also upon the conception one posseses as to justice, as to authority and liberty, as to the right of the community and the right of individuals, as to the proportion to be established in the incessent strife between these opposing forces; and this proportion varies and alternates. According to the disorder caused by the preponderance of one force or another, the factors may need to be reversed. Our conception of the social order is thereby changed and a counter blow dealt to our idea of social justice[1]".

Neo-Hegelianism.

Neo-Hegelianism, at it has been presented by its most authoritative exponent,[2] takes it stand on the Hegelian foundation of historic evolution, as Neo-Kantianism affiliates itself to Kant's formal theory which preaches the ideal of the formal independence of the universal ego, emancipated in moral law from its bondage of material motives. The end of evolution, according to Hegel was the self-realization of the Absolute by the complete synthetic unification of the Ego and the Non-Ego. Being more realistic than Kantianism, the philosophy of Hegelianism identified the Ego and the Non-Ego as the dialectic opposites subsumed under and within the constitution of the higher synthetic identity of the absolute, in which the Ego, by mastering the opposition of the Non-Ego, stands self-realized as the more perfected Ego. Kantianism regards the Non-Ego as unattainable by the understanding and proposes to master it by the bringing out or realization of the innate freedom of the practical Ego (will) from the bondage or resistance of the Non-Ego. Kantianism proposes to reject the Non-Ego, disregard its influence; and presents before the visage of

Its comparison with Neo-Kantianism.

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[1] "Leckle historique et droit natural." (Pub. 1902) I, pp. 80, 98.

[2] Kohler—see his Philosophy of Law translated in Vol. xii, of the Legal Philosophy series.

man the ideal of a moral autonomy in which the Non-Ego will stand annihilated by the supreme contempt of the Ego rising magnificiently superior to it and brilliant in its self-centred effulgence. The Non-Ego is to be subjugated by the Ego ceasing to desire for it, that is, by self-purification. Autonomy is the result of ceasing to allow the Ego to be influenced by the material desires. This is the idealistic formal philosophy to which Hegel opposed his realistic philosophy of identity. The Neo-Hegelians interpreted the Hegelian philosophy by their philosophy of culture (Kultur). Ego and Non-Ego are both real, and both form mutually co-ordinate and interacting parts of the absolute totality ; and evolution consists in the greater control and mastery acquired by the Ego over the Non-Ego or Nature which is the essence of culture. Evolution is thus the progress of culture. Not by ceasing to desire material pleasures and things but by acquiring perfect mastery and control over them must the goal of human endeavour be attained. Neo-Kantianism and Neo-Hegelianism alike admit the efficacy of effort ; but they differ in the matter of its direction. The former would direct this effort towards the freedom of the Ego from the bondage of matter by annihilating all interests except that of pure autonomy of self as pointed out by the moral law—the universal law of reason (for no other law can be universal for all rational beings). The latter (less philosophically, I should venture to affirm) would turn this effort towards the complete mastery and control of nature (culture) to coerce it to the uses of the Ego. The self-realization of this ego, according to Neo-Hegelianism, is brought about by its having external nature completely under control, so that it may be made to yield whatever the Ego commands. It consists not in annihilation of external desire, but in its unlimited expansion with power which carries certainty of its plenary fulfilment.

Hegel had a safer, though less accurate, philosophy in so far as he put this evolution into the staright jacket of the dialectic process. Evolution, according to him, must follow the natural, and also the logical, process of a gradual, slow, regular, ever rising synthesis. This greatly went against the "efficacy of effort" and failed to explain the retrogressions, anomalies and erratic movements of actual historic progress in the different societies of the world. Neo-Hegelianism would be still more, accurate and realistic than Hegel; it would take historic evolution as a logical as well as an illogical process, and the progress of culture as more dependent and amenable to conscious effort. It would attach greater weight and importance to the human will than Hegel had done. It sides with Schopenhaur, and his more modern prototype Neitzche[1], in their recognition of the autonomy and supremacy of the will over the understanding—over thought or its logic—and thus explains that the intervention of the human will may and does cause deflections from what would otherwise have possibly been the logical course of natural evolution in the universal history of man and the world. I said Kohler's legal philosophy is inferior to Stammler's because desire for the material things and pleasures itself is a form (though probably finer but not less potent) of bondage of the will (Ego) in spite of its control over nature acquired by the progress of culture. The superman is not free if he cannot do without the material things, and must always desire for them, although he can always procure them; and as long as this necessity or bondage continues, there will ever remain the chance of competition and struggle of individuals and societies for the material goods of life—of disturbance, distrust, pain and misery—amongst supermen as among men. With the progress of 'Kulture' (without any philosophy of moral law to guide it), such disturbances, struggle and misery will only be accentuated and magnified as has been so sadly demonstrated by the recent European war. The philosophy of Neitzche and Kohler must be co-ordinated with that of Stammler—there must be a complementary synthesis of the two—to lead to an evolutionary philosophy of History and of Law which will not only offer an accurate and realistic explanation of the world as it is but a philosophically sound theory of the ultimate ideal of the cosmic process of evolution. Neo-Hegelianism holds out a perfect philosophy of what is, but is defective with regard to the ideal. Neo-Kantianism holding, after Kant, the inaccessibility of the real nature of the Non-Ego to human mind, directs itself more pointedly to the philosophy of the ideal of practical reason wherein it excels. Both are sociological and evolutionary philosophies and they supply each other's defects.

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[1] Neitzche, however, draws ethical conclusions which are the very opposite of Schopenhaur's 'Nirvana.' 'Supremacy of will' leads to opposite paths and conclusions under the direction of different or opposite ideals. Reason which determines the correct ideal must therefore be given supremacy along with the Will in true philosophy.

Desirability of a synthesis of Neo-Kantianism and Neo-Hegelianism on account of their defects.

Neo-Kantianism and Neo-Hegelianism thus constitute the two forms of evolutionary pantheism or realistic idealism in legal philosophy, with idealism preponderating in the former and realism in the latter. Kohler's support of Heglian realism in refutation of Kant's theory of knowledge[1] (the inaccessibility of the the thing in itself to the understanding or 'pure reason' of man), rests on the doctrine of identity—the necessary correspondence of the subject and the object as parts of a cosmic whole. To me as the subject, the external world, including the other Egos, is, Nature, or object. That the two (subject and object) act and react on each other is proved by the experiences of all Egos. The experiences are made up of the contributions of both ; and it is certainly impossible to declare what the things of external nature would be like if there were no mind to percieve them. But as they appear to the precipient mind there must be in their essence something which somehow corresponds to the impressions they produce : for otherwise it is impossible to account either for the variety of these impressions caused by different things on the same mind, or for the general uniformity with which (after due allowance being made for individual idiosyncracies of the subjects) the same object produces its impressions on different minds. The world as it appears, or would appear to the subject, is all that we need know of it for practical purposes, because it carries with it, this certainty that the effect produced by it on us corresponds to its inner nature and is connected with it by a chain of causality. Space and time are therefore not merely apriori emanations exclusively of own minds (as held by Kant) but they correspond to somethings existing in external nature which affect our mind

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[1] See Sec. II, Philosophy of Law, pp. 12 *et seq.* Philosophy of Law Series, Vol XII.

Philosophy of Kohler contrasted with that of Kant.

and are interpreted by it as notions of space and time. Metaphysical essences of things may be different from our preceptions of them; but they must somehow correspond to the impessions they produce on us, for we ourselves are but parts of the whole consisting of the several Egos and Non-Egos mutually adjusted to each other by some metaphysical union and correspondence which is expressed in the correspondence of the impressions produced by their contact in the sensible world. The difference between the subject and object is only relative and momentary, that is, only for the time one Ego has abstracted and set itself in isolation from the whole for contemplating the rest. In accordance with Thomas Campanella he brusquely disposes of the epistemological doubt of Kant about the thing in itself being beyond the reach of pure reason, affirming a correspondence between our conciousness and the world process as parts of one and the same unity, that is, the unity of the universe.[1]

This is the critical realism of Hegel wonderfully well expressed by Kohler; who also accepts the Hegelian philosophy of evolution that every change is a becoming in which the newly born things and ideas spring out and carry forward to higher developments the essential elements and truths contained in and left by the decayed and disappeared forms. He denies however that the development of world history is always logical, always proceeding forward "in three part time" (being, non-being, and becoming) as Hegel conceived it. In the world of external objects as also that of thought we often find illogical and unrhymed changes—changes manifold and ramified—which cannot be always reduced to the logical Hegelian formula of unobstructed and constant growth.[1] Kohler accordingly here parts company with Hegel (hence his Neo-Heglianism) and advises the method of induction, advocated by positive philosophy, based on universal history studied in all it details. His kinship with the empirical sociological school is accordingly even closer than Stammler's. His philosophy however saves him from fatalism as well as from absolute nescience. Standing on the firm Hegelian bed-rock of the self-realising absolute, he assumes the certainty of advance or progress in the long run (Hegelianism) although his realism and profound historical mindedness keeps him well in touch with the dismal truth that the lines of progress as found in history have been not straight lines but "curves of affecting tragic diversity." He partially accepted the pessimistic truth enunciated by Schopenhaur, that blind will has considerably determined the path of world movement, and by Nietzsche, that more unreason than reason ruled the world (Neo-Hegelianism). Thus Neo-Hegelianism, which recognizes the necessity of founding truths and laws of legal evolution on facts of history studied in detail and generalised by induction instead of on mere deduction from philosophical formulas, constitutes an amalgam of comparative historicism in Jurisprudence in its broadest aspect (inculcating inductive and comparative studies in Anthropology, Ethnology, Linguistics, History and all other departments of sociological studies advocated by the positivists as detailed the last lecture) and the Hegelian metaphysics of the evolution of the absolute. While the metaphysics of evolution is utilised for the necessary and useful function of supplying the outer circuit line for testing and adjusting the material facts and truths of induction, the empirical survey and research laboriously carried on plot by plot into the fields of comparative history, law, anthropology, and ethnology constitutes the real and substantial foundation

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[1] See Duarte or Kohler. Kohler's Philosophy—p. 338.

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[1] It is a very interesting and instructive to observe that Savigny and Hegel were both exponents of regular slow, peaceful evolution; here contemporary views of Historical and Philosophical schools agree. Later on the Sociological schools (descendants of the Historical Schools) and the Neo-Hegelians (descendants of the Philosophical Schools)—contemporaries again—both agree with each other in opposition to their respective predecessors, that legal evolution is not logical nor peaceful and regular but mainly illogical,and the result of conflict. Both Savigny Hegel discounted the efficacy of individnal effort; but both Jhering and Kohler attached great weight to the individual will.

Combination of positivism and the Hegelian philosophy of evolution.

for the truths and generalisations by which the inner details of the map of legal philosophy and the science of Jurisprudence must be filled up. This is Neo-Hegelianism which supplies empty formal philosophy with the concrete facts of history, and corrects and tests and consolidates the truths of history by the light of the ultimate generalisations of the highest metaphysics and philosophy.

The development of culture

What in Hegel was expressed as the development of the Idea (absolute) becomes in Neo-Hegelianism the development of culture. The ideal of the evolution of human society is the attainment of the acme of culture. " It is the mighty aim ", says Kohler, " toward which we strive, the culture of knowledge on the one hand and that of new production and new activity on the other, which again is divided into aesthetic culture and the culture that controls nature. To know everything, to be able to do everything, and thus to master nature, that is the final aim of the development of culture and to have grasped this is the characteristic feature of Neo-Hegelianism [1]." I have already criticised this ideal of 'culture,' in the sense of Kohler, [2] as the philosophical basis and test of Law. But however faulty it may be as the ultimate goal of human life and Law and the final test of justice and right, it is certainly in its progresive development the most important factor in determining the form and contents of the Law of each society at every stage of its history. Undoubtedly Law is the product of the culture in the broad sense of everything that constitutes the civilisation of a people in the past and its changes and developments are occasioned by attempts to adjust the Law to the evolved culture of the present, fashion it so as to express more adequately the growing demands of culture. For 'culture' is a symbolic term used in the literature of Neo-Hegelianism to signify all the knowledge, powers, material and intellectual, and the other capacities and possessions of a society as a whole by which it adapts itself to the conditions of life.

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[1] Elsewhere he defines it thus —"The essence of culture in the sense of philosophy of law is the greatest possible development of human control over nature." See Philosophy of Law, (Vol. XXI, Leg. Ph. series, p. 329 note).

[2] See his definition of culture as the development of the powers residing in man to a form expressing the destiny of man. ' Moderne

Culture is a historic product.

The present culture of a society is a historic product of the various factors which have operated on the soul and spirit of the people.[1] The course of culture is condition-

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Recht's Probleme.' 'It is a social and not an individual possession.' See Prof. Small's (General Sociology, pp. 58-69) critical analysis of this ideal of Kohler quoted in Roscoe Pound's Scope and Purposes of Sociological Jurisprudence 25 Har. L. R., p. 157.

[1] Philosophy of Law—Vol. XII (Leg-Ph-Series), p. 36. Here Kohler reminds us of Puchta and the Historical school to which Neo-Hegelianism is affiliated in its material and historic side as much as to Hegal in its philosophic side.

ed mainly by the peculiar inherited racial qualities and talents as well as prejudices and twists and also by the surrounding local, climatic and vocational environments and the main and far-reaching events, for example, in the shape of foreign conquest,[1] in the historic life of the people. It is conditioned not only by the main current of psychic disposition resulting, as above, from the permanent historic causes but also by its comparatively temporary moods or periods of excitement[2] as in the case of individuals, such as religious fanaticism, emotional feelings, altruistic reactions after a period of pronounced egoism, and occasional spells of critical distrust for, and disinclination to abide by, the customs and authority of the past and craving for enlightment. There are besides pathological conditions of decay and disease—causing necessary aberrations in the development of culture, when the people pass through a crisis along lines of confusion and crass senselessness directly opposed to evolution and progress of culture. All these influences are causes of legal development and cast their reflection in the evolutionary history of Law; for Law and the psychic life of a people are intimately bound up with each other and the former must be

Aberrations in the evolution of culture.

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[1] P. 43 of Vol. XII, Leg Ph. series.

[2] P 36 of Vol. XII

read always in the light of folk soul and folk psychology.[1]

Culture comprises whole social history of a people.

Kohler draws two important conclusions from the above well established and indisputable facts of history:—(1) That Jurisprudence and Philosophy of Law must be based on the history of the culture of a people, which comprises the whole social history embracing amongst others its anthropological, racial or ethnological, economic as well as its psychic and religious history, and is not limited, as the Analytic school would take it, to its political history. (2) That the importance of the influence of the psychic element in this history on the development of culture, and hence of Law, indicates that the social history of a people is not a fatalistic movement, but can be consciously and intelligently sought to be moulded and directed along the right lines, by Law, in order to conserve the best elements of past culture, cast out its retarding and deleterious products, and to lead it to higher phases. This is the duty or function of supermen who, with superior insight into the necessities of cultural progress in advance of the masses, detect the flaws, pathological regressions and other impediments and hasten the natural evolution of culture by proper legal and administrative measures enforced by compulsion or force as much as is necessary. The

Progress of culture is to be guided by supermen with the aid of Law and force.

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[1] Cf. Puchta.

cultural necessities are found by the superman and laws are made to meet them. Compulsion and force of Law are thus justified as also the State which uses them for the promotion of culture. The highest conclusions of the Historical theory are thus accepted, while its doctrine of futility of conscious change is rejected; and at the same time the claim of the Analytical school that Law can be moulded and shaped at the sweet will of the sovereign is demonstrated to be false by Law being proved, as the expression of the cultural history of the people, to be dependent on its material and psychic conditions. The philosophy of Law is to be reconstructed on the recognition of the fact that Law and its development is not wholly rational or logical; it must admit and explain the illogical and unnatural and erratic phases of the social and legal history of man, and explain this by universal history of the broadest and most detailed type; and besides gauge, and attach due credit to, individual and racial psychology and recognise the efficacy of effort in the shaping and development of culture through that of the law.

Attitude of Neo-Hegelianism towards the Historical and Analytical theories

Dr. Berolzheimer also is a Neo-Hegelian and an advocate of the Hegelian "Culture Staat" like Kohler, but his sentiments are more conservative than Kohler's. He deprecates Kohler's view of legal and economic institutions as constantly shifting, "as lacking all

Berolzheimer compared with Kohler.

points of arrest which deprives his philosophy of practical application" [1]. This is due, Dr. Berolzheimer thinks, to Kohler placing too much reliance and emphasis on legal ethno logy and universal history and giving too much prominence to the shifting manifestations of cultural forces. The function of the human will in moulding this evolution, Dr. Berolzheimer thinks, is no doubt recognized, but Kohler's recognition of it is inadequate; for the cultural forces behind evolution become, through the interference and interpenetration of the human will, more artificial than natural forces, and a fuller appreciation of this would incline one to adopt a more practical attitude of encouraging active efforts towards amelioration of the Law than Kohler's whose teleology is rather quietistic than assertive. [2] Apparently Dr. Berolzheimer would like to strengthen, even more than Kohler, the position of the State, the legislator, and the Law and justify obedience to them as they are, for the sake of their practical efficiency and stability, by discouraging their constant criticism by reference to the philosophical test of culture. Dr. Berolzheimer is Kohler with a double dose of Wolff and Neitzche superadded, which accentuates his Germanic support of "powers that be."

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[1] World's legal philosophies, p. 427.

[2] See Kocourek's estimate of the difference between Kohler and Berolzheimer at p xix of vol. xii of Legal Philosophy series —" For him (Berolzheimer) Philosophy of Law is not merely an explanation of cultural phenomena—the possession of enlightened minds, the ideological counterpart which reflects but does not participate in the infinite multiplicity and variability of life" (as Kohler seems to take it)—but is a tangible objective and effective instrument which may be applied to the problems of society.

German Neo-Hegelianism has also found many adherents in Italy,notably Croce; and all Neo-Hegelians are agreed on its two fundamental ideas of pantheism and evolution, and the substitution of generalisation from facts in place of deductive reasoning or dialectics for the ascertainment of the actual stages of the evolutionary pa th in the history of societies and laws. Nevertheless the evolution of the Neo-Hegelians is not that of Darwin; for it is a rational process and not simply fortuitous, or even mechanical or positivistic. Though not unfolding with a logical necessity along universally determinate lines it is yet governed by a transcedental reality or principle which supplies a moral unity to the changing phenomena of evolution—a permanent energy and an eternal life as the common back ground actively directing the motion of the particulars and giving them a meaning or purpose. Evolution is thus a rational process guided by a sort of unconscious intelligence (and not by a mental process like our own as attributed to Divinity by the scholastics). The rationality and regularity of the process is perceived and valued only by taking account of long periods of universal history and by eliminating the

Neo-Hegelianism *vs.* Dawanism.

variety of illogical and regressive pathological elements which often and from time to time temporarily appear to disturb the main current. Their appearance only makes the cause of evolution more complex and variable, renders scientific and historic study of particulars necessary, but can not shake the sturdy optimism of Neo-Hegelian philosophy, for ultimately reason always conquers.

Modern tendency of legal philosophy.

You must have by this time not failed to observe how Neo-Kantianism and Neo-Hegelianism form progressive phases of transcendentalism and idealism descending towards realism, of rationalism to wards empiricism, of philosophy and deduction towards history and scientific induction, of abstr act apriori thought towards concrete ex-poster iori facts, and of immutable and universal reality towards changing and evolutionary particulars. Philosophy without giving up the claim, as its birth right, to the fundamental truths of existence now seeks to find their corroboration and fulfilment in and through the changing details of experience; its former tendency towards proud isolation has now happily given way to the broader synthetic view of things which looks upon the fundamental essences and their particular products or manifestations as indespensable complements for the appreciation of the reality that comprises both. Philosophy and History have come to shake hands and

Philosophy and History must go together.

combine with each other; for the truth is recognised that equally as philosophy has got to support itself by the facts of history, the latter must be read and interpreted in the light of philosophy in order that they may have an intelligible meaning and coherence.

But even here, even in the readiness of the sociological and social philosophical schools (in their latest developments), with greater catholicity than was ever evinced in the individualistic eras, to recognize the value and importance of each other's services, there was yet a perceptible, though much attenuated, element, touch, or spirit of mutual exclusion or isolation in as much as the sociological school proper (the empirical sociological schools of all shades discussed in the last lecture) assumed that the real essence and substantial part of Jurisprudence must rest on generalisations from facts gathered by research into present and historical forms of life, society and laws, and that true and valid philosophy only demanded that the generalisations of the sciences should attain the maximum degree of finality and universality. With them Philosophy was only the science of sciences and consisted of the ultimate generalisations of the sciences, unified under the final inductive generalisation of them all and reduced to one universal all embracing principle. There was the conviction still persisting that the psychic

Philosophy as understood by the positivists.

phenomena and forces were derivatives of the physical; and the conscious and voluntary effort and progress of man, however apparently distinguishable from the natural evolutionary forces and their reactions, was really of the same type as the latter; their adaptations were different not in kind but in degree; psychic and social forces and adaptations were only more efficient, and their accompanying consciousness and intelligence (like the appearance of light when the heat is sufficiently increased) indicated only the high degree of the efficiency attained. Physical, biological, and psychological forces were all treated as branches of the natural forces, and though the biological forces had come to be treated as a different, advanced and special type of natural force, the psychological was supposed to be only a heightened form of the biological. The advance of the scientific schools over their predecessors consisted in their coming to recognise the great fact of evolution in nature and the special character of the evolutionary forces behind it It was the advance of the conception of life and society from the mechanical to the biological, from the static to the dynamic, view;—the recognition of an active, assertive, and creative principle subsisting within the living body "willing" to live by controlling the opposing forces of nature; whereas formerly it was regarded as a

Physical and psychic forces.

mere product of mechanical forces operating on a particularly well adjusted instrument (the body). This indicated the broader attitude of the modern scientists and their readiness to admit existence of principles higher and more mysterious than those that they had hitherto proclaimed as scientifically verifiable and true. Philosophy, the exponent of the mysterious and supernatural forces, had been discredited as superstitous. Science, now more inquisitive than ever, was prying into these mysteries and extending the "ambit" of "Nature" to enclose as much of the 'supernatural' as possible. This was the mark of the incoming friendly spirit between science and philosophy—science agreeing to take up the investigation, in what it conceived to be the right way, of what had been hitherto the monopoly of philosophy (metaphysics), but (as the scientists took it) mismanaged by its apriori or unscientific methods.

Science aspiring to probe secrets hitherto unrevealed to it.

Now came the next great advance. The investigation of the mind—of the psychic forces and phenomena—came to be taken up with a new purpose and from a different standpoint. Those were regarded as constituting a special class by themselves and not as mere efflorescences of the biological principle. Just as the vital principle had been differentiated, by a closer study of facts, from the physical or mechanical forces on the eve of the era of the

The next advance

Investigation of the psychic forces.

organic conception of life and society, so the psychic forces were now, by a closer and more intimate study of experimental psychology, differentiated from the organic or biological; and this introduced the higher psychological conception of the Law and society which has now in its turn well nigh displaced the organic conception. It had been the fashion for sociologists and sociological jurists to explain the origin and development of society and Law by reference to mechanical and biological, including racial, that is, ethnological and ethnographical, forces and tendencies and to accept the psychological factors as merely conscious accompaniments of the biological evolutionary forces which really constituted the whole motive power. Sociologists and sociological jurists would hitherto glibly discuss in detail the economic necessities, the conflicts and adjustments of diverse interests, the geophysical environments, the historical experiences, as also the characteristic inherent powers and tendencies that lay from the beginning in the blood of the race for an explanation of the structure, the Law and civilisation of a society; and their discussion throughout would regard these as objective factors (mechanical or biological) of which the psychic part of man was the mere conscious recording machine. The distinctive characteristics of the mind, the freewill, its power to rise above its environments...&c...were insufficiently investigated and the insufficient analysis and knowledge of their nature, elements and characteristics was sought to be covered by a wholesale attempt to explain them away as resultants of objective biological evolution with a tacit admission (borrowed from the philosophies of Hume, Kant, or Comte) that their ultimate reality was beyond the ken of man. Personality was, with inadequate knowledge, identified with mere organic unity ; and although society was sometimes described as a superorganism, the elements distinctive of its superorganic character were not seriously and adequately made the subject of a special research.

The modern ethnological psychology.

But now ethnological biology soon led to ethnological psychology. The psychological element in man and society, which constitutes the distinctive character of personality and differentiates it from a mere organism now came in for its long delayed and over due share of attention ; psychologists and jurists like Wundt. (b, 1832), Gierke (b, 1841), Ward and Tarde (b, 1843) took up the new line of enquiry with great earnestness and vigour ; and Jellineck (1851—1911) utilised the new light thrown by these investigations for his brilliant juristic survey.

The modern Psychological school (the social Psychological school) has been aptly called the Neo-Socratic school just as the schools

The modern Psychological or Neo-Socratic school, its method and services.

considered above have been called the Neo-Kantian and Neo-Hegelian. I may suggest for these latter two other names, namely, the Neo-Platonic and Neo-Aristotalian schools respectively of the 20th century. The strong point of Socrates was his psychology, his study of man's inner psychic nature and of the notions formed by it. These notions freed from their material particularising contents were raised into metaphysical ideas, by Plato, which were, according to him, the great final goals and ultimate realities of the universe all else being unreal ; while Aristotle gave equal importance to the idea and matter. By making psychology amenable to scientific study and thus drawing scientific conclusions as to the psychic nature of man which had hitherto appeared as a riddle and left severely alone in the charge of the philosophers, this school took up an intermediate position attracting philosophy and science towards each other and making it possible for the two to join hands.

What the new psychology teaches us.

The first mission of the new psychology was to find the true character and origin of the human will and to establish that psychic and not biological forces were the real and most potent causes of social phenomena. It was scientifically proved (1) that the will in itself is neither conscious nor unconscious. Sometimes, as for instance, in somnambulism, when

Nature and origin of individual will.

by habit or inherited capacities and tendencies it has acquired the requisite proficiency, it is unconscious, and the agent acts without his muscle—movement being directed by any conscious or voluntary effort[1]; (2) that the individual's will and psychic constitution are the issue and product of collective life and social forces and cannot be studied adequately without reference to the collective will and race psychology; and (3) that collective or group will is as real as the individual will; that a group or association is a real personality; that it is in fact and reality more than a mere aggregation of individuals, measured, as in the cases of the individuals, by the powers which the group actually possesses of concerted action with a unity of will and purpose.[2] This was in fact the socialisation of psychology; the substitution of the older individual psychology by the new psychology which was social. What a man is, he owes to the union or relation of man with man; and his psychic equipment is a heritage chiefly of the psychic, and not of the biological or physical, influences and experiences of social life through which he and his predecessors had

Socialisation of psychology.

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[1] See Zitelman-Irrtum and Rechtsgeschaft, p. 79. Ward-Psychology, Encyclopedia Britannica.

[2] See Gierke—Das-deutsche Genossenschafts recht. This theory of social will, personality of the society or state, or the corporation theory is, however, subscribed to only by a limited circle of legal philosophers led by Beseler, Gierke and others who may be regarded as constituting only a branch of the Psychological School.

passed through generations.[1] These social forces are essentially psychic, and not biological as Spencer had concieved them. Law accordingly was a natural outcome of the psychology of races.[2] The racial consciousness, consisting of feelings, emotions and desires arising from the communal life of man, naturally and spontaneously produces the Law as it produces the racial language and customs.

Relation of conscious volition and involuntary reflex action.

This modern psychology instead of regarding conscious volition as an intensified kind of natural or involuntary reflex action held to the converse view that the so-called involuntary and biological reflex actions are the results and issues of the long continued or habitual conscious actions registered in the organic vehicle of the conscious agent and transmitted through heredity to his descendent. This is how modern psychology puts mind and the psychic and the conscious forces above matter and the unconscious physical and organic forces and makes the latter dependent upon the former.[3] Not only Law but also Ethics is thus based on a psychological basis; that is, explained by reference to the data of the moral consciousness—the moral conceptions which have slowly accumulated in the communal life history of man through ages and generations and become part, through habit and heredity, of the moral constitution of the man and the society. The organism is influenced by psychic forces till, by habit and heredity, it registers and begins spontaneausly to start the reflex actions in imitation of what was consciously and voluntarily (psychically) willed, desired or approved before. It is thus that psychology is made to re-establish scientifically what was hitherto taught by philosophy by the apriori method, namely, that the so-called natural forces and their involuntary uniformity of actions were at the beginning voluntary and conscious; that Nature is, or at least began, as a conscious agent; that biological selection had an inherent and fundamental conscious teleology; and that causality is not mere sequence but has at its origin a will moving towards a conscious end. The gulf between causality and teleology is thus bridged and teleology is set above causality as its conscious determinant and ruler. Thus the fatalism connected with the earlier evolutionary theories is avoidėd and the possibility of changing the natural course of evolution by a higher teleology and conscious effort to a better course and end is established. The natural and spontaneous evolution of the Historical school is thus accepted and given a new meaning; for evolution starts as a teleological process and become next, by habit and heredity, an unconscious and spontaneous process; but all

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[1] See Ward Dynamic sociology—Chaps. 5, 7, 9 and 11.

[2] See Wundt-Logic Second Edition, vol. ii, part ii, pp. 533—561.

[3] See Ward-Psychology-Encyclopedia Britannica.

Its covollaries·— *Re*. Nature and God, causility and teleology and efficasy of effort.

the same it is capable of being controlled and modified by higher teleology and conscious effort of the group will.

Association and imitation.

Tarde explains "habit" of the will by his theory of "imitation." Association and imitation are besides the two psychological processes by which group wills are constituted, habits of volition and thought are formed, and both continued and transmitted through generations by heredity. Society is thus an organisation which is partly a product of unconscious evolution (which again may be traced at its origin to cosmic consciousness and volition) and partly a result of conscious planning of the members. It is a completely organised expression of psychological forces [1].

The Analytical view of Law supported by the Psychological theory.

Gierkes' theory of the reality of group-wills and the real unity of society—in fact the psychological, as apposed to the biological, interpretation of society—has considerably come in aid of the Analytical view of Law as a conscious command. One of the finest expositions of some of the juristic positions of the psychological school comes from the Neo-Austinian camp. [2] In voluntary associations and corporations the unity is artificial and imposed from without; but in the society there is a natural

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[1] See Giddings-Principles of Sociology—p. 420 *et seq.*

[2] See Jethro-Brown-Underlying principles of Legislation, Chaps. III & IV, see next Lecture.

The reality of social unity; its superiority over mechanical and organic unities.

unity, more or less pronounced, which binds the citizens together to form one combined body. The forces which tend to produce this unity by attracting the individuals in the society towards each other are mainly psychological; namely, sympathy and love, arising out of the consciousness of the likeness of each other in body, mind, sentiments and potentialities and consciousness of the common purposes, aspirations and ideals. There are, besides, the growing organic dependence of the individual upon the society for all that he needs for his subsistence, work, and enjoyment and for all the opportunities of service, and need of sacrifice, (physical or intellectual) necessary for his moral and spiritual growth; and the growing psychological recognition of this dependence as man more and more advances in thoughtfulness. The more this unity is felt and realised by the individuals, the greater becomes the solidarity of the society; and the force of social pressure, in the shape of public opinion or of legal or political sanction, to keep individuals in the path of probity, justice and social good becomes not only more efficacious but also more socialised, that is, assumes forms which are more attuned to the general social sentiments and accordingly more and more acceptable to the people; and this in its turn reacts upon the society and draws it together in closer unity. In this way the society grows into a true living and conscious, and hence super—organic or psychological, unity which constitutes its personality ; and what principally raises this unity above the level of mere organic or mechanical unity (that subsists in some form or other throughout the totality of nature, for instance, in the celestial world, in the vegetable and animal kingdoms) is the superior psychological bond of growing sympathy and love between the individuals in society.

Society is an organic and not mechanical unity-reasons.

The Psychological school admits that the society is an organic and not a mechanical unit or group and adopts all the arguments of the biological schools in support of that position ; namely, (1) that individuals suffer and wither like branches removed from a tree if they are cut off from their social environments. (2) The development of a nation is of the nature of organic growth due partly to the gradual unfolding of its latent capacities and partly to ideals, knowledge, and sources of strength imbibed, it may be, from foreign sources, but assimilated into the system and not merely mechanically superimposed like the patching up of a cloak. The development of its law for instance, so far as it is effected through customary law, is not *manufacture* at all but *spontaneous generation* ; and even in so far as it is effected by legislation it is not despotic manufacture, for in the making, interpretation and administration of statute-laws the state is considerably influenced by the nation's past history and the spirit of the race and time. (3) That the state officials are not mere agents, servants or representatives of the community for they are themselves parts of the community from which they derive their authority and as such are organs of the social organism. [1]

Society is more than an organism. It is person, reasons.

But the Psychological school goes further. It distinguishes the social organism from the biological organisms, like plants or animals, pointing out that the former is a discrete organism, that is, an organism in which every component unit (individual member) has a separate end or individuality of its own while consciously sharing in the (*i.e.*, national) life, objects and efforts of the whole or totality. The biological organisms are concrete, for the component cells are without any separate self-conscious end or individuality. Their existence is simply for the sake of the whole and merged in the latter as means to an end. They cannot individually reflect and consciously share in the life and mission of the whole. The biological theory cannot explain the psychological phenomena, that is, of intelligence love, sympathy, desires and sentiments which constitute the basis of human life and the most potent factors of social union and solidarity. The Psychological theory on the other hand, compares organic and psychological growth and notes the points of difference between the two. The former (that is, growth of physical organisms) is spontaneous and limited in time; the body will not grow after a certain age is attained and is less affected than mind by environments. The growth of the mind, on the other hand, is purposive, unlimited in time and extent, and more readily affected by external circumstances. Social growth is, in this respect, like psychic growth and unlike organic or physical growth; for it proceeds without limit as far as the latent possibilities of the society would allow and is more amenable to environments and influences, which are purposive or easily selected and applied, than mere organic growths. The society or the State is accordingly a psychic and not a biological unit and its characteristic differences which mark out its superiority over physical organisms are noticable in its internal composition as well as in its mode and limits of growth.

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[1] See Jethro-Brown Principles of Legislation, Ch. V.

Justification of the personal theory.

The justification for laying so much stress on the psychic as opposed to the merely organic character of the society is that it explains the efficacy of effort towards legal and social amelioration. The biological theory of evolution, based on the principle of spontaneous unconscious growth under the forces of natural selection, is fatalistic; and it discourages all conscious efforts of Government by legislative and other interferences towards the improvement of society as useless and mischievous. The psychological theory on the other hand in upholding the superiority and mastery of mind over matter, and of conscious intellectual effort over the blind natural forces, opens out a more hopeful possibility for organised human devices and efforts, like the state and legislation, successfully saving the society from the passive subjection to biological laws. In assimilating social growth to a mental process it points out that this growth, in the shape of social, political and legal improvements, is not passive but assertive; it is self-made and more and more conscious and deliberate as it develops; it tends, as it proceeds, to become more and more pronouncedly teleological instead of causal.

Korkunov's presentation of the differences between inorganic, organic and social aggregates.

The essential differences between the organism and society have been elsewhere summarised thus[1]:—While the facts and phenomena of the inorganic world are invariably based upon and determined only by the existing facts or present conditions, and those of organic life by its present conditions as well as its past history and embryology, the facts and phenomena of social life are determined not only by the present and the past but also by a third important and characteristic element, namely, the psychic conception (born of the memory of the past experiences and desires born of that memory) of a future ideal. A mechanical (that is, inorganic) aggregate, for example, a pile of stones, is inert and depends solely upon its present external conditions for its equilibrium and existence. It has no fund of energy of its own to adapt itself to new conditions like the living organic body. The organism has such a fund of energy which is life and which requires for its scientific explanation a consideration of the past conditions so that the origin of its life and its successive phases of growth and development may be traced. The mechanical aggregate may continue in equilibrium for ever if its present conditions are undisturbed and conversely will fall apart whenever the external conditions are changed. There is no natural death for these aggregates. But the organism will resist by its life force as far as possible the disturbing influences of changed conditions at least for sometime and conversely will cease to grow and live naturally after a certain period and after its "type" is attained - even if its present conditions are not changed. It is not wholly passive but assertive to an extent and in a manner which can be ascertained only by an enquiry into the past history of its internal constitution—the history of the quantity and character of the energy implanted into it at its birth which enables it to assert itself by self adaption amidst and against the external conditions.

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[1] See Korkunov—Theory of Law, p. 287 *et seq.*

The society on the other hand, combines the advantages of both and have a special self assertive capacity in addition ; for so long as it holds to some psychic ideal as a source of perennial strength and support it will live despite all adverse change of external conditions ; its life or growth is not limited like that of an organism, but unlimited. If the society can manage to have higher and higher ideals of which there is no limit as in the organism, it will live and grow on for ever. It has no natural death and its self-assertion against external nature is more than organic for it is mostly conscious and voluntary and more and more so as it evolves. The bond connecting the different members of society is more psychic than physical or organic ; it does not require physical contact and this enables an individual to belong to different societies or to different organs or branches of the same society at the same time. The organic theory of society fails to explain the established social fact that social evolution is in proportion to the psychic capacity of the society to form social ideals of the mutual sympathy and union of the members The psychological theory of society on the other hand is proved by the fact that the conditions which favour the psychic development of the individual or society also develop the social life ; and the progress of civilisation marks simultaneously

Refutation of the organic and support of the pyschological theory of society.

the progress of the mind, as also, the social solidarity of the people. There is, moreover, another serious obstacle in the way of the organic theory of society. Development of the organism as a whole is marked by increasing dependence of the component cells but in social life the progressive liberty of the individual marks the path of progress of the society as a whole; indeed it is often taken as a condition of social progress. The psychological theory which bases social union on the psychic unity of the will of the members is much more helpful in explaining and accounting for this highly significant character of social progress.

Practical utility of the Psychological theory.

The great practical service of the psychological theory has been its refutation of some of the most strongly asserted dicta of the Historical school which had, since Savigny's days, been largely responsible for a great deal of legislative "Laissez Faire" and inactivity. Society is a psychological unit and the chief basis of its unity is the psychic ideal formed in common by the members of the society as a whole. The ideal itself can grow and in fact does grow with the psychic advance of the members. It is not a type rigidly fixed and predestined as in the case of the organism beyond which the organism cannot grow. It can be improved, recast and remodelled by voluntary and conscious education and training of the members; for example, by bringing them into contact with other ideals of neighbouring societies.

Influence of the psychological conception on the Theory of Law.

The Theory of Law and legal development, as propounded under the psychological conception of society, supplements the defects of the mechanical as well as of the organic conceptions. The mechanical theory of Law as a command of the sovereign, imposed ab-extra for the shaping of the society and the regulation of its conduct, like the manufacture of formed articles out of the raw material, had been refuted and demolished by the Historical school; and this gave rise to the Organic theory which countenanced the Historical theory of Law as an unconscious and spontaneous product of national life. But this involved, as first forcibly pointed out by Jhering, an under-estimation of the element of conscious or purposive direction—the intelligent adaptation of means to desired ends—in legal evolution. Jhering made it clear that juridic sentiment is not the source but the product of Law; Law is *made*, at least in its advanced stages, and not *found*, or unconsciously formed, for it is an agency by which the growth of national life is deliberately and consciously moulded by putting it under intelligently selected environments. The making of Law and its development are not indeed pure manufacture as the Analytical theory would suggest; but still they are the results, to a great extent, of voluntary and deliberate marshalling of biological laws for preconceived purposive ends.

The test of personality.

The cardinal basis of the psychological theory [1] is the conception of the social will—of the personality of the society or the state. The test of personality is the unity of will. Whenever a group evinces a capacity of acting under the guidance of one centralised and united directive will it becomes a real and not a mere symbolical or fictitous personality. The personality is not necessarily anthropomorphic and limited to natural persons or human beings. The Deity is a personality, for the element which is the test of personality namely will, (which, here, is divine) is present in Him. So is a corporation a person. The 'will' makes the personality; and the nature of the will, natural, divine, or social, marks the character of the personality which it makes. Law does not create (by fiction) persons in the shape of corporations but only recognizes personalities where they already exist as real entitites. "Legal persons," in such cases are not therefore fictitious, but realities. The most comprehensive personality represented by the united will is that of the society or the State. One important corollary of this theory would be that "Law" is the expression of the will or command, not of the ruler or legislator, but of the society or State, regarded as a personality, expressed through the ruler or the legislator as its organ or mouthpiece.

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[1] Or rather, of the "corporation theory" of the society in which shape or form it is expounded by the Gierke School

The Psychological school [1] has taken considerable pains to develop the doctrine of social will, which constitutes the personality of the society, and characterise its exact nature and character. The social will is itself a growing and fluctuating thing. It is marked by the *esprit de corps* with which each individual subordinates his own will and ends to the will and object of the whole body; and the readiness with which this subordination is willingly and voluntarily shouldered by the individuals marks the perfection of the personality of the society. The unity of the social will is to be distinguished from "the will of all" which is an algebraic summation of the wills of the individuals; and the mere fact that on particular occasions the different wills of the individuals, operating towards the self-interest of each, happen to coincide, for example, under the stress of some external pressure, does not convert what is really "the will of all" into "the social will." Jethro Brown aptly illustrates this by citing the case of a train of horses or a slave gang working together along similar lines under the whip of the owner or master, where their wills coincide but are not united into one will; for no individual member

The social will.

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[1] *i.e.*, the branch of it which is headed by Gierke.

of the train or gang has any conception of the interests of the whole body, nor wills nor shapes his individual activities for the sake of the furtherance of the ends and interests of the whole body rather than of his own [1].

The conception of the social will is as old as Rousseau; but the Psychological school has sought to advance a scientific explanation of the personality of the society and the question has since become one of the most points for scientific research and deliberation.

The defective psychology of the older schools.

It is desirable here to make clear how much the new psychology has helped to serve the cause of legal science and usher in the new conception of society and Law which has almost revolutionised the older ideas which on scrutiny were found inadequate for supplying a satisfactory explanation of social facts. The older psychology of the Rationalistic school held to intuitionism and the theory of innate ideas with a fundamental stock of which (the same in all) the individual was supposed to be born prior to and independently of all personal experiences. That of the opposite school held to perceptualism, or the theory of mind as a *tabula rasa*, in which the whole stock of ideas was held to be peculiar to each individual and acquired wholly and solely though his life's experiences. Both of these theories were outgrown by the scientific establishment of psychic evolution; for while according to the doctrine of innate ideas the mind of the individual was deemed unchangeable and his fund of innate ideas incapable of modification, the theory of preceptualism posited that the individual mind in all cases started its career as a blank leaflet and its evolution was limited to, and circumscribed by, his individual existence and experiences. The fact of gradual evolution of the mind and its capacities, from generation to generation, by the assimilation of the accumulated product of the experiences, not only of the individual but of the race, was not then known and much less explained by either of these theories.[1]

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[1] See Jethro Brown's Underlying Principles of Legislation, Chap. IV.

Their failure to explain the relative independence of the individual.

The result was that neither theory could furnish an explanation of the relative independence of the individual and his relatively autonomous activity amidst the external influences surrounding him. The sensationist

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[1] "The idea of psychical development in the individual is not very old. For a long time there has been recognised the transmission from generation to generation of a certain amount of knowledge, fruit of the preceding generation's experience. This was as far as it went. Only science was regarded as transmissible. The sentiments and the will were not. In any case the mind was deemed unchangeable, and as identical in all classes of humanity. To the partisans of intuitionism the man at all stages of his life was the same. There was no way of modifying his fund of innate ideas.

Under the opposite theory, also, the man had in him something unchangeable and identical in all individuals, the *tabula rasa*. The psychic development was limited, then, to that of the individual. One generation had no influence upon another." Korkunov Theory of Law p. 299.

(preceptualism) theory would reduce man to a passive automatic machine, his organic and psychic reaction against external influences being rigidly bound and fixed by determinate laws and therefore as much beyond his control, as the influences themselves ; the intuitionist theory would go to the opposite extreme and attribute to him an absolutely free will capable of rising superior to his surroundings, and a fund of innate ideas, independent of history, race, or genealogy—both extreme positions being falsified by established facts [1].

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[1] "Modern psychology which has especially developed itself in England rejects alike both theories as we have set them forth. It does not admit the existence of innate ideas, at least not in the absolute sense in which the intuitionists assert them Neither does it believe, like the sensationists that our whole psychic life results only from our personal facts.

"Modern psychology holds to the mean between these two conceptions. It recognises that the whole psychic life can be explained by the entire experience external and internal, by the individual's personal experience and by that of all humanity, the collective experience. The moral life is no longer recognised as simply the result of external influences, of the individual environment. What the man gets from the external would is completed and modified in him by the concepts of the inward experience. So too, our ideas, which are by connection with, the entire development of mankind derived from universal experience, are as regards particular individuals innate ideas, bequeathed by the preceding generation. Such a theory has not the faults indicated in the preceding theories.

"Under this theory man is no longer an automaton guided solely by external phenomena. The movements of his soul may be due to conceptions furnished to him by his own inner experience. Physiological or even pathological facts, special dispositions of our own organisms, may produce in us independently of any external experience some special activity of the mind. We must add to these those actions produced by sentiments tendencies and tastes bequeathed to us by our ancestors and

Freedom of will explained according to the psychological theory.

In support of this last proposition, or rather by way of meeting some of the objections to this doctrine, the psychological theory fixes the exact character of the so-called "freedom of will" which had been often misinterpreted to mean that it, *i.e.*, the will, is not subject to any law, not even to that of causation. The psychological theory does not deny that the will can create, that is, cause phenomena ; but it certainly repudiates the idea that the operation of the will is not itself the result of

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we can easily explain the relative independence of the individual as regards his external environment. There will be no need to interpose the opposition between human actions and physical phenomena, no need to appeal to any special freedom of the human will.

"Modern psychological theory rejects also ancient opinion which denied the psychic influence of one generation over another. If our ideas and sentiments are product of the entire secular experience of humanity, individuals and generations ought to be connected not only in space but also in time

"The psychic life of each generation is only a link connecting former generations with those to come The unbroken bond of psychic development through succeeding generations has its source in psychic heredity and this theory in fact gives to the laws of heredity an importance in all social sciences because they establish a connection between each individual and all mankind, past and future, or at least connection with some particular nation.

"All aptitudes, tendencies, physical and psychical are, thanks to the laws of heredity, not a product of individual life, but of man's collective life. The modern psychological theory recognises, then, a connected transmissibility in the psychic development of generations and sees in the individual in a preeminant degree a product of historic and social life. The psychical character of this social bond which combines man into communities does not prevent the hereditary social influence from having a regular and continuous advance. Human ideas, although they are a distinct factor in social life, are themselves the result of a regular successive development; they develop along with the social life itself. Korkunov Theory of Law, pp. 300-1.

predisposing causes, like impressions, desires, or character. It asserts that that the will itself, like external facts, is subject to the principle of causality, that is, is a link in the universal chain of manifested existence wherein not a single fact is an absolute uncaused principle but everything is caused by something preceding it and causes others, according to determined laws, that follow. The volition of the will is not free in the sense that it has no cause, but it is free in the sense that it has a causal power to give rise to phenomena. There is a form of thought which allows no such power to the will and holds out for the fatalism that every event must take place logically, unavoidably, and independently of man's wills or acts. There is the opposite view that man may will and act at his pleasure unaffected by, and rising supreme above, antecedent or surrounding circumstances. Both are wrong as opposed to the scientific principle of causation which holds good in the world of psychology as well as the external world. The first view errs because it militates against the Law of causality in positing the existence of some force or fatality (call it divine will, destiny, or predetermination) which must give rise to a given phenomona, *i.e.*, must produce a certain result, independently of, and even in opposition to, all antecedent links in the succession of acts and events, the intermittent human volitions and efforts. The

Refutation of opposite views.

acts and events, according to this view, of a man's life must come and appear as predetermined, however, great man's effort to avoid them may be. They don't depend upon the human will, nor on external events, nor upon any laws of sequence of phenomena (events or acts), but upon some unexplained external force which makes every manifested fact a miracle. Thus the view does not so much deny the human will's freedom of voliton as the effective character of the volition in shaping or modifying future external events. This is denial of the law of causation altogether and hence is scientifically false and untenable.

The law of causation.

The law of causation itself is often misunderstood. It is merely descriptive, for it lays down that given certain antecedents certain consequents uniformly follow. The law itself is not the cause, but it describes the cause. The law of gravitation does not produce but only describes the phenomena of gravitation. Arguments in support of fatalism based on uniformities,[1] observed by statistics, of voluntary human acts, like assassinations, suicides, marriages, divorces, arsons, seek to make out the futility of human volition and efforts against what is found by the law of statistics. Such arguments are wrong for the law of statistics is only a record of observed uniformities, resulting from uniformity of the antecedent circumstances, of the societies observed. The law of causation does not demand a certain number of issues or marriages in a year in a society but only records that, given certain data, as to the life, civilisation, enviroments and motives, operating in a certain society uniform results in the shape of marriages, divorces and issues are observed to follow ; and this only illustrates the universality of the law of causation which does not insist on uniformity of results in spite of changes in antecedent causes but only uniform results consequent upon uniform causes. It is the observed uniformity of nature that constitutes the law and the most universal uniformity is that everything is an effect of some previous cause, and is in its turn the cause of some subsequent result, and their sequence is always certain and invariable.

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[1] See the facts and figures gathered to substantiate this wonderful uniformity in the works of Quetelet—Physique Social; (1869) R. Greiffer (Statistics), Knapp—Jahr bucher fur Nationalkomic and Statistics XVI (1871).

How it operates on the human will.

The operation of the human will is one of those links in the chain of causality and follows like all others the law of causation, is caused by antecedent facts and causes subsequent ones. It is not free from the general causal law.

The entire mental processes constitute a unity.

The modern psychologists lean towards the view that the entire mental process of cognition emotion and volition is not the sum total of three different kinds of processes and

They are neither tripartite nor physiological reflexes.

faculties but presents a unity (psychosis) distinct from the antecedent physiological processes though of course intimately connected with them. In its relations to the outside world the mind is both receptive and active; receptive in so far as it receives impressions and is excited by them to emotion; active so far as it transforms its impressions and emotions by reasoning and volition. The vital knot between the reception and activity is formed by attention, that is, by the selection of certain facts for mental treatment.[1]" The old tripartite subdivision of the mental faculties by the associationists, like Locke, Hume, Mill and Bain, into feeling willing and emotions is thus excluded; as also the theory of the later physiological psychologists like Fechner, Mandsley, Ribot and especially Lange [2] that all mental processes of these faculties are mere psychological reflexes, themselves not productive in any way but merely mainfesting or registering, like a meter, the organic processes. The modern psychological school recognises psychosis as a causal agent intervening between physiological processes and the subsequent external activity of the conscious agent with a real causal influence of its own[1]. It is besides a process sometimes conscious and sometimes unconscious so that the view of the older psychologists that all mental faculties and processes are dependent upon cognition or intellection cannot also be maintained The psychic phenomena of cognition, emotion and volition are accompaniments and phases of the real process of which the most essential function is the selective attention towards external impressions, spoken of above, for adjusting oneself to the surroundings. The so called primary elements of human consciousness, *viz.*, the ideas, as also the emotions, instincts, tendencies, which guide and direct volition have now been resolved into their factors buried deep in the history and constitution of the individual and the race.

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[1] See Vinogradoff Historical Jurisprudence. Introduction page 37; Ward's Psychological principles, p. 57.

[2] See Lange—Las Emotions translated by G. Drums (1902), p. 10.

Mental faculties not necessarily dependent on cognition.

This theory takes human will as caused, *i.e.*, subject to the Law of causation, and also as having itself causal force and so supports the efficacy of effort in legal development.

The psychological theory thus repudiates the doctrine of free-will that claims for the will immunity from the causal law. It analyses historically the composition, tendencies and habits of the human will, including communal life and heredity, as formed from antecedent facts bearing upon the formation of racial and individual psychic capacities and dispositions, and at the same time seeks to avoid fatalism by holding that human volitions have their causal effects on the external world as much as other antecedent facts. Thus it gives scientific support to the position that proposes to recognise and respect the efficacy of voluntary human effort, among others, in the direction of social and legal development and amelioration.[1] The individual rulers are displaced, as makers of Law, by the personified State with its group will regarded as a reality, and synthesis is made by which the correct and valid elements of the Analytical, Historical and

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[1] See Ward-Psychology in Encyclopedia Britannica—vol xxii, p. 586.

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[1] The will according to this school is not a special faculty separated from cognition and feeling but only the appetitive side (of a unitary principle which includes all the three) more or less manifest in every mental process. It is present in the process of selective attention at the bottom of every cognition ; and free will is really the expression of one's own psychological constitution operating upon sensations and experiences. This psychological constitution is of course determined by causal antecedents (hereditary tendencies, education, culture, reason, conscience etc,) but that is an internal and psychical as distinguished from external and physical necessity which imports fatalism. "In spite of self-consciousness no action and no will can be thought to be causeless. In fact will appears as the last link in an endless chain of causes ranging from the immediate impulses which led to the exertion of the will power—to the remote conditions shaping character and circumstances. In this way it may be taken for granted that every act of a man is pre-established by previous states and events. If, however, the point of view is shifted and we reflect on our will as the effecient cause of change and on our actions as springing from our resolve, we are conscious of the resolve as of a choice between possibilities, and sometimes we may watch the conflict of motives which prompt us in various directions. The conception of free-will is therefore a fact of consciousness in which ......we oppose the various influences preceding action to the resolve which initiates it. The appeal to reason in the choice of possibilities is perfectly justified and the formula of free will comes to mean in substance that men do not follow impulses blindly but are normally able to act in accordance with their reason and morality." See Vinogradoff—Historical Jurisprudence, p. 424.

Organic theories are sought to be harmoniously combined with the higher philosophies of evolutionary realism represented by the Neo-Kantians and Neo-Hegelians

The present universal attitude towards the Law of Nature.

The absolute and eternal Law of Nature —supremely abstract and a priori—is now thoroughly discredited alike by the philosophical, empirical and psychological schools; and evolution of Law, that is, of the concrete positive law, is the central topic of all juristic speculations of all camps.

Society and social will more important for the science of Law than organisation and the State.

One of the outstanding contributions of the psychological school to the science of Law is, as noticed before, the preeminence given to the group will from which the mandates of Law emanate rather than to the administrative and co-ercive organisation by which those mandates are enforced, if necessary, by physical force. The concrete organisation which constitutes the State may be very well suited for the enforcement of Law but it is not absolutely necessary for the making of Law. Whenever any association, for example, the church[1] develops the capacity of forming a communal will, under a proper *esprit de crops* subsisting in the members, it becomes a "person"; it is in a position to lay down laws for the community comprised by the association. As a corollary to this proposition, or rather by way of support, and as supplementary to the same, the psychological school or theory also asserts that no command assumes the character of Law till the command is recognized and accepted by the community, that is, is countenanced by the group will reflected in the bulk of the individuals. This recognition or acceptance of the Law by the community supplies what is according to this school the most essential element, that is, the psychological guarantee of Law, *i.e.*, of its being obeyed by the community and enforced, with the help of this common acceptance and recognition, against individual transgressions[1]. This guarantee is psychologically more powerful than sanction or punishment to make laws effective. Commands not so recognised and accepted are hardly 'laws' even if they may be occasionally made obligatory by brute force on individuals in particular cases. Such so called 'laws' often become dead letters. One important practical conclusion drawn from these two cognate positions is that 'International Law', becomes Law in the truest sense of the term as soon as the association of independent states from which the Law emanates has developed a sufficiently definite groupwill for the purpose, and the rules themselves are truly expressions of the

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[1] Compare Jellineck,—Allgemeine Staatslehre, pp. 329-331.

Command is not Law till recognised and accepted by the group will.

Hence, International Law is law in the true sense of the term.

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[1] Compare Jellineck -Allgemeine Staatslehre, pp. 239-254.

volitions of the groupwill; and the fact that there is no political head over those independent states does not militate against its acquiring a true legal character. The Psychological school thus represents the inner psychology, and not the outer husk or form, of Law; and this is the important difference between the Analytical and the Psychological school which seem to agree on many other important particulars. They are agreed that Law is made, that it is a command and is enforced by sanction; but while the Analytical school looks to the individual will of the sovereign as the source of Law, the Psychological school points to the community and their group will; and whereas the former insists on the essentiality of the compelling sanction supported by physical force, the latter regards recognition or acceptance of the community as the really important factor in the constitution of Law.

The points of similarity and difference between the Analytical and the Psychological schools

Social life, including its legal factor, is thus psychologically and not metaphysically interpreted by this school, and the psychology is racial instead of individual. Mutual imitation and assimilation, partly conscious and partly subconscious, of each other—the sense of social similarity—is the mark of the social group[1]. Law (and society and state organisation) is traced not to any objective metaphy-

Interpretation of social life, Law, and the state by racial psychology.

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[1] Tarde—Le Lois de l'imitation Second Edition Paris, 1895, Ch. II & Chap. III, p 46 & 65 and 73.

Psychology of the will, *i e.*, ethical theory involved in legal science and in administration of justice.

Law deals with the human will and its efficacy is felt through its operation on the will. Psychological ascertainment of the state of the will is necessary in the practical administration of justice, for examples, in investigations as to testamentary capacity; in questions of consensus, negligence, fraud, undue influence; in case of testaments, contracts and torts; and in questions of guilty or dishonest intention, sanity, &c.; and in crimes, in fixing the right, duties and liabilities of the person concerned. Modern psychology, as has been observed before, regards the will not as a special faculty but as the appetitive side of every cognition and feeling, in as much as it is necessarily involved in the mental activity in the shape of "attention" which is necessary for all cognitive process.

The right determination of the will in questions of right justice and morality.

With regard to the question of right, justice or morality, that is, the right determination of the will, a question of fundamental importance in Jurisprudence, intuitionism solved the question by the doctrine of conscience. Altruism posited some natural traits, which predisposed man to acts of benevolence charity and goodwill to others, side by side with the opposite self-seeking tendencies. Egoism denied the existence in man of any but selfish motives and sought to explain moral action by the theory of enlightened egoism (Hobbes). This egoistic morality found its most eloquent exponent in

Different theories on the point.

Nietzsche who seeks to identify the highest morality with the free and far-seeing self-determination of the superman seeking his self-realisation. Other attempts to derive altruism from individual egoism had been made by Hume who introduced his doctrine of Sympathy by which a man suffers by a process of mental substitution of himself in the place of others whom he finds in misery; and also by Adam Smith who advanced the doctrine of of objective (as opposed to Hume's subjective) participation in the feelings and sufferings of others as an observed fact in nature, and ascribed altruistic acts to the desire of individuals to avoid the pain of this objective participation[1]. A more scientific and elaborate scheme to reduce the two sets of motives (egoistic and altruistic) to one principle was laid down by the social utilitarians from the biological or organic theory of society and life. Altruistic habits, they proceed to point out, are produced in man and lower animals by biological adaptation tending to the conservation and the success of the species. Mutual combination of individuals, involving self-sacrifice and co-operation with others, is conducive to the progress and preservation of the race and fits it for the struggles and competitions of life. Altruistic habits thus arise in man and animals and they are transmitted as unconscious and inherent tendencies in subsequent generations by heredity. Modern psychology perfects this doctrine by its theory of social will, that is, the general will of the community, and derives morality from the preponderance with which the collective will asserts itself as a real force over the individual will. The subservience of the latter, at first voluntary or even under pressure, gradually induces, a harmony of the two wills when they spontaneously and naturally come to agree with each other[1]. This places ethical theory on the racial psychological basis instead of an ethno—biological basis. The society or State is likened to a corporation, instead of to an organism; and the Law and morality are founded on the corporate will instead of on the organic idea.

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[1] See Historical Jurisprudence—Vinogradoff, p. 46.

Ethical theory based on racial psychology by the psychological schools.

The psychological theory necessarily put a check on the then favourite conception of Society as separate from and independent of the State and on the corollaries drawn from that conception. The mistake of considering human society as a biological or natural unit assimilated to animal societies was clearly demonstrated; it (society) was proved to be a psychological and not merely a biological or organic unit. The State thus instead of being opposed to society comes to be a special, and indeed the most comprehensive and

Society and the State.

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[1] Wundt—Ethick—II, pp. 29-30.

perfected, type of society, evolved, like Law, partly unconsciously and partly consciously, as a matter of psychological necessity [1] (as opposed to logical or biological or fatalistic necessity in which the operation of the human will has no effective share). There is moreover, according to this theory, a happy avoidance of either of the two extreme views, the first of which would claim absolute autonomy of the individual, the cessation of all Law and its organised enforcement, while the second would demand the complete merger of the individual in the State as in the case of the organic structures; for the psychological unity of the members of the society presupposes the health, vitality and the strength of the wills individual and social, that is, of all parties united by the prevailing *esprit de corps*; and the growth of individuality of the members is as much necessary for the growth of the State (as so conceived) as their readiness to sacrifice their interests for the common cause. Co-ercion of the individual by the State, while not declared illegitimate or *ultra vires*, is discouraged as ordinarily, unnecessary or inexpedient.

Individual and the State.

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[1] Jellineck 1881—1911.

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